No. 358. **January Term, 1957.**

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT.

GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, Executors Under the Will of Mamie DuBan, Deceased

v.

HARRY J. ALKER, JR.,

Appellant.

RECORD.

Appeal From the Order of the Court of Common Pleas No. 1 (Tried in C. P. No. 3) for the County of Philadelphia as of March Term, 1954, No. 973.

FRANK F. TRUSCOTT,
929 Land Title Bldg.,
Phila. 10, Pa.,

JOHN J. GILBRIDE, JR.,
813 Market St. Nat'l. Bank Bldg.,
Phila. 7, Pa.,

ISIDORE BAYLSON,
1500 Land Title Bldg.,
Phila. 10, Pa.,

GEORGE CHIMPLES,
1222 Western Saving Fund Bldg.,
Phila. 7, Pa.,

Attorneys for Appellant.

International, 711 So. 50th St., Phila. 43, Pa.

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RELEVANT DOCKET ENTRIES.

Complaint in Assumpsit. Served and made known to Deft. 3-10-54.

Mar. 9, 1954. Complaint with notice to plead within 20 days from service filed. Jury trial waived.

Mar. 30, 1954. Answer and New Matter and Counterclaim with notice to plead to new matter and counterclaim filed.

Apr. 13, 1954. Plaintiffs reply to new matter and counterclaim with notice to plead to new matter within 20 days from service hereof filed. Jury Trial waived.

May 3, 1954. Defendants counter reply to Plaintiffs new matter filed. Jury Trial waived.

Oct. 21, 1954. Plaintiffs Interrogatories to Defendant to be answered in writing under Oath under Pa. R. C. P. 4005 filed.

Oct. 30, 1954. Defendant's objections to plaintiff's interrogatories, filed.

Nov. 6, 1954. Proof of service of copy of defendant's objections to interrogatories upon B. H. Hellman, Esq. Attorney for Plaintiffs and Edwin Booth Esq. for Plaintiffs both on October 30, 1954.

Dec. 15, 1954. The Court allows the serving upon the defendant the written interrogatories and orders the defendant to file written answers thereto and serve copy thereof 20 days hereof, Griffiths, J.

Jan. 27, 1955. Defendant's answer to Plaintiff's Interrogatories filed.

Mar. 27, 1956. Non jury before MacNeille, P. J. Continued pending taking of depositions in Mr. Alker's Office at 10 A. M. on Mar. 28, 1956.

Eo Die. Order entered.

Apr. 6, 1956. Transcript of stenographic record filed.

Apr. 24, 1956. Depositions of Harry J. Alker, Jr. filed.

Apr. 24, 1956. Deposition of Elva Bruce filed.

Apr. 25, 1956. Before MacNeille, P. J.

Apr. 26, 1956. Findings reserved pending the filing of requests for findings.

May 22, 1956. Transcript of stenographic record filed.

July 10, 1956. Court finds for the plaintiffs and against the Defendant in the sum of $143,876.42.

Eo Die. Findings and Opinion filed. R. MacNeille, P. J.

July 13, 1956. Defendant's exceptions to findings of Court filed.

July 14, 1956. Defendant's additional exception to Court's findings filed.

Feb. 21, 1957. Rule to show cause why the verdict or findings should not be set aside and a new trial granted.

Eo Die. Petition filed. All proceedings to stay meanwhile.

Mar. 4, 1957. Plaintiff's motion to dismiss defendant's petition and rule for a new trial.

Mar. 27, 1957. Answer of Plaintiffs to petition of Defendant for a new trial because of after discovered evidence filed.

Mar. 29, 1957. Motion to dismiss is withdrawn—see approval.

Apr. 5, 1957. Continued pending taking of depositions.

May 28, 1957. Plaintiff's rule to proceed filed.

June 7, 1957. Affidavit of service of rule to proceed filed.

June 7, 1957. Ordered that defendant take depositions in support of his petition and rule for a new trial within 15 days from date hereof otherwise all averments of fact responsive to the petition and properly pleaded in the plaintiffs answer shall be deemed admitted for the purpose of the rule—see order.

June 28, 1957. Rule discharged.

July 3, 1957. The defendant's exceptions to the findings of the Court are dismissed; the Prothonotary is directed to enter judgment for the plaintiffs on the findings heretofore made.

Eo Die. Opinion and order filed, MacNeille, P. J.

July 9, 1957. By order of Attorney for Plaintiff Judgment is taken on verdict for Plaintiffs against Deft. in sum of $143,876.42.

July 17, 1957. Certiorari brought into Office as of Jan. Term 1957, No. 358 from Supreme Court. Appellant Harry J. Alker, Jr., filed.

July 25, 1957. Notice of Appeal on July 17, 1957 to Supreme Court of Penna. and acceptance of service by E. Booth, Esq., for Appellees on July 23, 1957 filed.

COMPLAINT.

(In Assumpsit.)

1. The plaintiffs are Girard Trust Corn Exchange Bank, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in a banking and trust business with offices in the City of Philadelphia, and Florence Eisher Dunwoody, who resides at 7426 Beverly Road, in the City of Philadelphia, Executors under the Will of Mamie DuBan, deceased.

2. The defendant, Harry J. Alker, is and has been for many years an attorney at law engaged in practice as such in the City of Philadelphia presently maintaining his offices in the Land Title Building, S. W. Corner of Broad and Chestnut Streets, in said City.

3. That the said Mamie DuBan died on November 8, 1953, at the age of 86 years, a resident of the City and County of Philadelphia, leaving a Last Will and Testament dated May 18, 1951, and Codicils thereto, duly proved and admitted to probate by the Register of Wills of Philadelphia by whom Letters Testamentary were granted unto the plaintiffs on November 16, 1953.

4. That the said Mamie DuBan was the widow of Alfred A. DuBan who died on November 12, 1938, a resident of the City and County of Philadelphia, leaving a Last Will and Testament dated October 20, 1936, duly proved and admitted to probate by the Register of Wills of Philadelphia, by whom Letters Testamentary were granted thereon unto the said Mamie DuBan, the Executrix therein named, on November 21, 1938.

5. That the said Mamie DuBan was the sole legatee and beneficiary under the said Last Will and Testament of the said Alfred A. DuBan, deceased.

6. That the defendant had been a close and intimate friend of the said Alfred A. DuBan for many years prior to his decease during which period he had also been his legal counsel, and in his capacity as attorney for said decedent during his lifetime and as attorney for his widow and Executrix after his decease, the defendant owed to them the duty to act with the highest degree of fidelity and fairness and the utmost of good faith in all of his dealings and transactions with his said clients by reason of the relationship of trust and confidence existing between them.

7. That during his lifetime the said Alfred DuBan did from time to time lend to the defendant an aggregate of 4,400 shares of common stock of National Dairy Products Corporation upon the dates and in amounts as follows:

September 29, 1931	1,000 shares
October 10, 1930	200 shares
October 15, 1930	1,200 shares
November 24, 1930	2,000 shares
	4,400 shares

That the loans of said shares of stock were made by the said Alfred A. DuBan to the defendant upon the promise and undertaking of the defendant to return said shares upon demand as evidenced by written receipts signed by the defendant, true and correct copies of which are hereto attached, made part hereof and marked Exhibits 1, 2, 3 and 4.

8. That the defendant did not return any of said stock to the said Alfred A. DuBan in his lifetime and in the settlement and distribution of the estate of said decedent there was transferred and assigned, inter alia, unto the said Mamie DuBan, the sole legatee and beneficiary under his Will, the claim of the decedent

against the defendant for said shares of stock. That the written assignment of said claim, a true and correct copy of which is hereto attached, made part hereof and marked Exhibit 5 was prepared by the defendant who was then acting as counsel for the said Mamie DuBan, individually and as Executrix under the Will of her late husband in all matters relating to the settlement of his estate.

9. That subsequent to the death of the said Alfred A. DuBan there were from time to time returned by the defendant to the said Mamie DuBan 2,475 shares of said stock or the equivalent thereof, so that by December of the year 1943 there remained due and owing by the defendant to the said Mamie DuBan a balance of 1,925 shares of said stock which number of shares he continued to owe her until the time of her death and now owes to her estate.

10. That the said 4,400 shares of stock were deposited by the defendant, with the consent of the said Alfred A. DuBan, as collateral for a loan which the defendant had with the Integrity Trust Company of Philadelphia, and the dividends declared thereon were paid by the National Dairy Products Corporation to the said Afred A. DuBan and after his decease to Mamie DuBan as Executrix of his estate, until on or about November 20, 1942 when because of default of the defendant the said shares were transferred of record on the books of the corporation into the name of the Federal Deposit Insurance Corporation which was the assignee of the Integrity Trust Company of the loan of the defendant. Thereafter as and when quarter yearly dividends were regularly declared and paid by the National Dairy Products Corporation upon its common stock in March, June, September and December of each year, the defendant, in acknowledgment and recognition of his obligation and

pending the return of said stock to her, paid to the said Mamie DuBan a sum equivalent to the dividends upon the number of shares from time to time owing by him to her, and commencing in December 1943, and continuously thereafter until the time of her death, the defendant regularly paid to the said Mamie DuBan sums equivalent to the quarterly yearly dividends regularly declared and paid by said Corporation in the aforesaid months of each year, upon 1,925 shares of said stock, the last of said payments having been made by the defendant on or about September 16, 1953.

11. That notwithstanding written demand made upon him on February 24, 1954, for the return to the plaintiffs on or before March 8, 1954, of certificates for 1,925 shares of common stock of the National Dairy Products Corporation and to pay to the plaintiffs the sum of $1,443.75, being an amount equivalent to the dividend of 75 cents per share on 1,925 shares of said stock paid by the National Dairy Products Corporation upon its common stock on December 10, 1953, the defendant failed and refused to comply with such demand. A copy of said letter of demand is hereto attached, made part hereof and marked Exhibit 6.

12. That the market value of 1,925 shares of common stock of the National Dairy Products Corporation on March 8, 1954, was $126,087.50 based upon the closing price of $65.50 per share on said date.

13. Wherefore plaintiffs claim of the defendant the sum of $126,087.50 with lawful interest thereon from March 8, 1954, together with the sum of $1,433.75, with lawful interest thereon from December 10, 1953.

EDWIN BOOTH,
BENJAMIN H. HELLMAN,
Attorneys for plaintiffs.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

W. L. Cleaves, being duly sworn according to law, deposes and says that he is Senior Trust Officer of the Girard Trust Corn Exchange Bank, one of the Executors under the Will of Mamie DuBan, deceased, one of the above-named plaintiffs, that he is duly authorized to and makes this affidavit on its behalf, and that the facts set forth in the foregoing Complaint which are within the personal knowledge of the deponent are true, and as to facts based upon the information of others deponent, after diligent inquiry, believes them to be true.

W. L. CLEAVES.

Sworn and subscribed to before me this 9th day of March, A. D. 1954.

K. M. Pizzo,
Notary Public.
My Commission Expires January 7, 1955.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

Florence Fisher Dunwoody being affirmed according to law affirms and says that she is one of the Executors under the Will of Mamie DuBan, deceased, one of the above-named plaintiffs, and that the facts set forth in the foregoing Complaint which are within the personal knowledge of the affiant are true, and as to facts based on the information of others affiant, after diligent inquiry, believes them to be true.

FLORENCE FISHER DUNWOODY.

Affirmed and subscribed to before me this 9th day of March, A. D. 1954.

K. M. Pizzo,
Notary Public.
My Commission Expires January 7, 1955.

EXHIBIT 1.

ATTORNEYS AND COUNSELLORS AT LAW
1419 Land Title Building
Philadelphia

J. Levering Jones

Dimmer Beeber
Henry C. Boyer
William P. Beeber
E. Waring Wilson
Harry J. Alker, Jr.

October 10th, 1930.

Alfred A. DuBan, Esquire,
8th Floor, Land Title Building,
Philadelphia.

Dear Mr. DuBan:

This will acknowledge the receipt by me from you of two hundred (200) shares of National Dairy Products Corporation Common stock, which stock I am to have the right to use with the Integrity Trust Company as collateral for my loan and which stock I am to return to you upon demand if not sooner.

I cannot tell you how much I appreciate your great kindness.

Sincerely yours,

H. J. ALKER, JR.

EXHIBIT 2.

ATTORNEYS AND COUNSELLORS AT LAW
1419 Land Title Building
Philadelphia

J. Levering Jones

Dimner Beeber
Henry C. Boyer
William P. Beeber
E. Waring Wilson
Harry J. Alker, Jr.

Received as loan October 15, 1930, of Alfred A. DuBan, certificates totaling twelve hundred shares of National Products Corporation Common stock belonging to him, which I am to return to him on demand if not sooner.

HARRY J. ALKER, JR.

EXHIBIT 3.

ATTORNEYS AND COUNSELLORS AT LAW
1419 Land Title Building
Philadelphia

J. Levering Jones

Dimner Beeber
Henry C. Boyer
William P. Beeber
E. Waring Wilson
Harry J. Alker, Jr.

Received, November 24, 1930, of Alfred A. DuBan certificates totaling two thousand shares of National Dairy Products Corporation common stock to be returned on demand or sooner.

These certificates with the certificates already delivered for fourteen hundred shares of National Dairy Products Corporation common stock constitute a loan to Harry J. Alker, Jr., making thirty four hundred shares in all.

HARRY J. ALKER, JR.

EXHIBIT 4.

RECEIVED this 29th day of September, 1931, from Alfred A. DuBan the following certificates of the Common stock of National Dairy Products Corporation as a loan to me, and to be used by me as collateral security for loans made to me by the Integrity Trust Company of Philadelphia, State of Pennsylvania:

C61465	100 shares
C61466	100 shares
C61467	100 shares
C61468	100 shares
C61469	100 shares
C61470	100 shares
C61471	100 shares
C61472	100 shares
C61473	100 shares
C61474	100 shares
	1,000 shares

This is to acknowledge also that I have 3,400 shares of National Dairy Products Corporation Common stock loaned me by Mr. DuBan and pledged sometime ago.

HARRY J. ALKER, JR.

EXHIBIT 5.

KNOW ALL MEN BY THESE PRESENTS That I, MAMIE DUBAN, Executrix of the will of Alfred A. DuBan, deceased, do hereby assign, transfer, set over and deliver unto MAMIE DUBAN all the following:

Claim against Dr. Andrew Anders for 913⅓ shares of National Dairy Products Corporation;

Claim against James Hewitt, Jr., for $400;

Claim against Blanche Peters for $200;

Claim against Harry J. Alker, Jr., together with all interest of the estate in the Metropolitan Life Insurance policy assigned as collateral;

TO HAVE AND TO HOLD the same to and for the use, ownership and behoof of the said Mamie DuBan and her executors, administrators and assigns, absolutely.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of April, A.D. 1946.

MAMIE DUBAN
Executrix of the will of
Alfred A. DuBan, deceased.

Witness:
LUNA LOEVNER
J. CLIFFORD SMITH

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

On this the 12th day of April, 1946, before me, a notary public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have set my hand and official seal.

J. CEMBURT SMITH
Notary Public
My commission expires

EXHIBIT 6.

February 24, 1954

Harry J. Alker, Jr., Esq.
Land Title Building
Broad and Chestnut Streets
Philadelphia 10, Pa.

Dear Sir:

The Girard Trust Corn Exchange Bank and Mrs. Florence Fisher Dunwoody are Executors under the Will of Mamie DuBan, who died November 8, 1953, and a short certificate of their appointment is hereto attached.

At the time of her decease you were under obligation to deliver to Mrs. DuBan upon demand 1,925 shares of common stock of the National Dairy Products Corporation and demand is now made upon you for delivery to the Executors of certificates for this number of shares and the payment to them of $1,443.75 being a sum equivalent to a dividend of seventy-five cents per share on 1,925 shares, the National Dairy Products Corporation having on or about December 10, 1953, declared and paid a dividend of seventy-five cents per share on its common stock issued and outstanding.

Unless certificates for the number of shares mentioned be delivered to the Executors and the sum of $1,443.75 paid to them on or before March 8, 1954, the Executors will be obliged, in the performance of their duty, to institute proceedings against you and it is hoped that you will make this unnecessary by complying with the demand now made upon you.

As you know, Mrs. DuBan held and her Executors now hold as collateral to secure your obligation an assignment of policy No. 6 641 296 A of the Metro-

politan Life Insurance Company, insuring the life of Harry J. Alker, Jr., with an assignment thereof, and a certificate for 125 shares of Mrs. Smith's Pie Baking Company, with an assignment thereof, and upon compliance by you with the demand now being made, you will be entitled to the return of these collaterals, otherwise the Executors reserve the right to deal with the said collaterals in such manner as may be proper.

Very truly yours,

GIRARD TRUST CORN EXCHANGE BANK
By
s/ W. L. CLEAVES
W. L. Cleaves, Asst. Vice President
s/ FLORENCE FISHER DUNWOODY
Florence Fisher Dunwoody
Executors under the Will of
Mamie DuBan, deceased.

Enclosure

DEFENDANT'S ANSWER.

The defendant, Harry J. Alker, Jr., for answer to the Plaintiffs' complaint, says:

1. Admitted.

2. Admitted. The defendant also maintains an office at Norristown, Montgomery County, Pa., and practises law in said county.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted that defendant was a close friend of Alfred A. DuBan, and also a close friend and counsel for Mamie DuBan. As to the remaining facts alleged in paragraph (6) of the complaint, they amount to conclusions and therefore need not be answered.

7. Denied. The 4400 shares of stock were loaned by DuBan to the defendant for the purpose of being lodged with defendant's loan as collateral. When the last 1,000 shares were loaned on September 29, 1931, they were delivered by DuBan to William F. Fischer, who was an active member of the Board of Directors and the Executive Committee of the Integrity Trust Company, with instructions that they were not to be deposited with the Integrity Trust Company unless the Integrity Trust Company agreed that it would place upon the life of defendant a term policy for five years; Alker to pay the premiums on the policy and the interest on the loan regularly; the Integrity Trust Company to agree in consideration of the said deposit and the said agreement of Alker that it would not disturb the said loan or the collateral therewith during said period unless in the meantime the security came

back where all could get out w[illegible]e. The Integrity Trust Company agreed to such terms and the stock was deposited in accordance therewith.

Defendant alleges and avers that when the 1,000 shares of stock were loaned on September 29, 1931, there was no "demand" agreement. Mr. DuBan's prior loans had been made by him for the purpose of deposit with Alker's said loan. When the last loan was made he insisted on the Integrity Trust Company making the agreement heretofore set forth in this paragraph before he deposited the 1,000 shares. The loans thereupon ceased to be on a demand basis and were subject to said agreement. Mr. DuBan's prior stock had been loaned by him to protect Alker's loan and because of the condition of the market it was necessary for additional collateral to be placed with that loan. He, therefore, to protect his own collateral which had theretofore been pledged with the loan put up the additional 1,000 shares on the basis of the foregoing agreement.

8. Defendant admits that he did not return to DuBan in DuBan's lifetime any of the specific certificates referred to. DuBan did have in his possession or with his loans certificates for 775 shares which belonged to defendant, which DuBan applied on account of the 4400 shares.

9. Admitted that defendant purchased in all 2,475 shares of National Dairy Products Corporation stock and same were either returned to Mr. DuBan or his estate or to Mrs. DuBan. Defendant denies that at the time of Mrs. DuBan's death he owed the estate anything. On the other hand defendant avers that the estate was indebted to him, the details as to which are set forth in defendant's counterclaim.

10. Denied. Defendant alleges and avers that the said payments were made in accordance with a certain

agreement with Mamie DuBan which is set out more particularly in defendant's new matter.

11. Demand admitted. Liability denied for the reasons set forth above and in the new matter and counterclaim.

12. Admitted.

13. Denied. Defendant alleges and avers that for the reasons set forth in the new matter and counterclaim he owes nothing to the plaintiffs.

EDWIN HALL, II,
HARRY J. ALKER, JR.,
Attorneys for Defendant.

NEW MATTER.

14. Defendant avers that all of the 4,400 shares of National Dairy Products Corporation common stock were advanced by Alfred A. DuBan to protect the loan of the defendant. When the last 1,000 shares were advanced on September 29, 1931, said DuBan was unwilling to advance the same "unless the Integrity Trust Company which had the loan, together with various collateral including DuBan's shares, would make an agreement as hereinafter set forth. An oral agreement was entered into with the said Integrity Trust Company that, if the said trust company would place upon Alker's life a term policy of insurance in the sum of $125,000 for the term of five years and Alker would pay the premiums thereon regularly and the interest on the loan thereunder at the rate required by the trust company, the Integrity Trust Company would not disturb the loan or collateral during that five year period unless in the meantime the market price of the collateral advanced to such an extent that

all parties would get their equities back out of the collateral, then Mr. DuBan would deposit the 1,000 shares of National Dairy Products Corporation common stock. It was agreed between the parties and Mr. DuBan delivered the 1,000 shares of stock with the proper assignments in blank to William F. Fischer, a director and member of the Executive Committee of the Integrity Trust Company, who completed the details of the arrangement.

15. Defendant alleges and avers that the Federal Deposit Insurance Corporation alleged it had acquired, among other things, from the Integrity Trust Company, the Alker loan with collateral, including the DuBan collateral, as security for a loan to the Integrity Trust Company, and afterwards on January 20, 1943, it sold to itself the collateral with the Alker loan, including the DuBan collateral, even though there was no default by Alker, on his part, of the agreement, and thereafter transferred all the stocks to its name. Some time thereafter the defendant and Mamie DuBan entered into an oral agreement to the effect that defendant would pay promptly to Mamie DuBan each quarter an amount equal to the dividend she would have received on the unreturned stock so long as she lived, and that upon her death any further obligation on the part of the defendant personally to return any stock then unreturned would terminate and cease, as she was only interested in getting the dividends for life. It was further agreed that, if any of the stock with the Federal Deposit Insurance Corporation was recovered in the proceeding against the Federal Deposit Insurance Corporation, that such portion of the stock so recovered would be returned to her. The said Mamie DuBan as Executrix and individually was a party to the litigation pending for the reinstatement of Alker's loan with the Federal Deposit Insurance

Corporation, and for the return of the collateral therewith, including the DuBan certificates, upon payment of the amount due on the loan.

COUNTERCLAIM.

By way of further answer and defense, the defendant alleges that the plaintiffs are indebted to him in the sum of $29,000.06, with interest, upon the following cause of action:

16. That at the time of Alfred A. DuBan's death he was indebted to Alker in the sum of $4,115.50, as will appear by the federal estate tax return and the transfer inheritance tax returns filed by Mamie DuBan as Executrix.

17. That there also became due and payable to Alker for legal services in the said estate the sum of $7,500, as will appear by the federal estate tax return and the transfer inheritance tax returns, which sums have never been paid.

18. That in the proceeding against the Federal Deposit Insurance Corporation Mamie DuBan, individually, and as Executrix, was a party. Costs and fees of more than $35,000 have been paid by the defendant in connection with the said litigation, no part of which was paid by her and of which she would owe her share.

19. That the defendant has rendered to the said Mamie DuBan, individually, since her husband's death in 1938, and until a few weeks before her death, continuous legal services, including preparation and filing of her personal property returns and income tax returns; handling the sale of her large Ventnor cottage and the contents; assisting in arranging a transfer of her loan from the Pennsylvania Company to the Manufacturers Trust Company, having a friend

put up additional collateral at the Pennsylvania Company, guaranteeing the same; handling the sale of a large boat house property at the Inlet section of Atlantic City, N. J., the sale of the contents, the giving of possession thereof, the various difficulties in the tax department arising out of the same; the conducting of a suit against Dr. Andrew Anders and various other incidental matters which arose almost weekly during said period; the compromise of a claim against George W. Heuer, Sr., and the income-tax problem arising thereout. The defendant claims that $1500 per year is a reasonable charge therefor, or $22,500 in all from 1928 to date.

20. That all of the said sums were to be waived in consideration of the agreement made by Mrs. DuBan whereby defendant was to pay her the dividends for life only and there was to be no liability by defendant to her estate after her death, as set forth more in detail above.

21. Alker claims, if the said agreement made by Mrs. DuBan is not to be respected, that the said estate is indebted to him in the sum of $50,615.40, as follows:

Amount due defendant by Mr. Duban at his death,	$ 4,115.40
Attorney fee due by said estate,	7,500.00
Mrs. DuBan's share of the cost of litigation,	15,000.00
Legal services to date of death of Mamie DuBan,	22,500.00
Moneys advanced by the defendant in connection with tax, stamps etc.	1,500.00
	$50,615.40

22. That the value of the stock so converted by the Federal Deposit Insurance Corporation at $15.75 per share is $30,318.75. At the time of the death of Alfred A. DuBan the said 4400 shares of stock were appraised at 13⅝ per share, or $26,228.13, which fixed the amount in dollars and cents that defendant owed the estate. That added to the interest at 6% in the sum of $16,523.72 on the unpaid amount, or $42,751.84 would, under any circumstances, be plaintiff's claim.

Defendant has, instead of 6% per annum paid the estate of Mamie DuBan individually, the following:

1938	$1,925.00
1939	1,540.00
1940	1,540.00
1941	1,540.00
1942	1,540.00
1943	1,925.00
1944	2,117.50
1945	2,695.00
1946	3,176.25
1947	3,465.00
1948	3,465.00
1949	4,235.00
1950	5,390.00
1951	5,582.50
1952	5,775.00
1953	4,331.25

23. If Mrs. DuBan's agreement is not to be respected there is due the defendant by plaintiffs

The amount set forth in paragraph 21 hereof,	50,615.40
Plus the excess interest,	21,136.50
	$71,751.90
less	
Amount set forth in paragraph 22 hereof as her total claim,	42,751.85
	$29,000.05

with interest from the time of her death.

24. The defendant claims of the plaintiffs the sum of $29,000.05, with interest from November 8, 1953.

EDWIN HALL, II,
HARRY J. ALKER, JR.,
Attorneys for Defendant.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.:

HARRY J. ALKER, JR., being duly sworn according to law, deposes and says that he is the defendant above-named; and that the facts set forth in the foregoing answer, new matter and counterclaim are true and correct.

HARRY J. ALKER, JR.

Sworn to and subscribed before me this 30th day of March, 1954.

J. J. BUCHMAN,
Notary Public.

(Seal)

My Commission Expires Feb. 1, 1957.

PLAINTIFFS' REPLY TO NEW MATTER AND COUNTERCLAIM.

REPLY TO NEW MATTER.

14. Denied. The plaintiffs aver the true fact is that all of the 4,400 shares of common stock of the National Dairy Products Corporation were loaned by Alfred A. DuBan to the defendant under written agreement by the defendant to return the same on demand and neither the said Alfred A. DuBan, nor the said Mamie DuBan, individually or as Executrix, ever released the defendant of his obligation to return the said shares. Whether Alfred A. DuBan participated in any manner, in an agreement alleged to have been entered into between the defendant and the Integrity Trust Company, the plaintiffs are advised is irrelevant and immaterial because any participation by Alfred A. DuBan in such agreement was never intended to and did not release or discharge the defendant of his obligation to return all of the said 4,400 shares of stock.

15. The Federal Deposit Insurance Corporation, as assignee of the Integrity Trust Company of the collateral loan of the defendant did, sometime on or about November 20, 1942, transfer the collateral with that loan, including the 4,400 shares of National Dairy Products Corporation common stock which had been loaned to the defendant by Alfred A. DuBan, as aforesaid, unto itself. Thereafter the National Dairy Products Corporation ceased to pay dividends upon the said shares unto the said Mamie DuBan, individually or as Executrix, and the shares were subsequently sold with the other collateral by the Federal Deposit Insurance Corporation and the proceeds of such sale applied toward the liquidation of the indebtedness of the defendant. The Federal Deposit Insurance Corporation thereafter entered suit in the District Court of the United States for the Eastern District of Pennsyl-

vania, and procured a judgment against the defendant in the sum of $117,581.35 on November 8, 1944, representing the difference between the indebtedness due to it by the defendant and the amount realized from the sale and liquidation of the collateral with his loan and the said judgment remains of record and unsatisfied. It was shortly after November 20, 1942, on or about which date the said 4,400 shares of National Dairy Products Corporation were transferred on the books of said Corporation into the name of the Federal Deposit Insurance Corporation that the defendant, in acknowledgment and recognition of his obligation and pending return of the stock to her, commenced to pay and thereafter continued to pay to the said Mamie DuBan a sum equivalent to the dividends upon the number of shares from time to time owing by him to her. The plaintiffs deny that at any time the said Mamie DuBan entered into an oral agreement with the defendant to the effect that if the defendant would promptly pay to Mamie DuBan, each quarter, an amount equal to the dividend she would have received on unreturned stock so long as she lived, that upon her death any further obligation on the part of the defendant personally to return any stock then unreturned would terminate and cease as she was only interested in getting the dividends for life. The plaintiffs further aver that any such agreement would be null and void inasmuch as it was without any consideration, the defendant at the time of the alleged making thereof being under obligation not only to return to the plaintiffs' decedent, or her estate, all of the said 4,400 shares of stock but to pay to her on her estate sums equivalent to the dividends she would have received thereon until the return of said shares. Moreover, the procuring by the defendant of an agreement of the nature alleged, from his own client, an elderly woman, of little or no business experience, who was relying upon defendant as her counsel to protect her

property and rights, was such a violation of the duty imposed upon the defendant by virtue of the relation of attorney and client, and was so inequitable and unconscionable that it would not be enforceable in law or equity. It is further denied that there was ever entered into by the said Mamie DuBan any oral agreement with the defendant with respect to any shares of stock that the defendant should succeed in having returned to him in the litigation in which he became involved with the Federal Deposit Insurance Corporation and the allegation of the defendant in this regard is irrelevant and immaterial inasmuch as the plaintiffs' decedent was entitled to the return of all the shares and how the defendant was to procure the shares to be returned was no concern of the plaintiffs' decedent. The plaintiffs are further informed and believe and therefore aver, that any participation by Mamie DuBan as Executrix, or individually, in the litigation in which the defendant became involved with the Federal Deposit Insurance Corporation is irrelevant and immaterial and moreover any participation by her was solely at the request of the defendant and to such extent as he determined would be helpful to him in such litigation, the said Mamie DuBan relying upon the assurances of the defendant, who was her legal adviser and at the same time representing himself in such litigation; and plaintiffs aver that any participation of the said Mamie DuBan in the said litigation was never intended to nor did it affect any release or discharge of the defendant from his obligation to return to the said Mamie DuBan or her estate all of the said 4,400 shares of stock of the National Dairy Products Corporation. The plaintiffs further aver that in said proceedings no monetary judgment was sought or obtained against the said Mamie DuBan individually or as Executrix of the Estate of Alfred A. DuBan, deceased.

REPLY TO COUNTERCLAIM.

16. The plaintiffs are without knowledge or information as to the truth of the allegations contained in Paragraph 16 of defendant's Counterclaim, the means of proof of the alleged facts being within the exclusive control of the defendant and, if material, due proof thereof is demanded. The plaintiffs aver that Alfred A. DuBan died November 12, 1938 and his estate was fully settled and distributed by Mamie DuBan, Executrix under his Will, sometime prior to April 12, 1946, with the full knowledge and under the legal advice and instructions of the defendant who was acting as her counsel in the settlement of the estate, and any claim of the defendant against Alfred A. DuBan for the sum of $4,115.50 was payable out of his estate and the plaintiffs are advised, believe and therefore aver that any claim of the defendant for the sum of $4,115.50 against the estate of Alfred A. DuBan, deceased, or against the estate of Mamie DuBan, deceased, is barred by the Statute of Limitations of the Commonwealth of Pennsylvania in such cases made and provided.

17. The plaintiffs aver that the Federal Estate Tax Return and Transfer Inheritance Tax Return in the Estate of Alfred A. DuBan referred to in Paragraph 17 of Counterclaim, and which were prepared by the defendant, show a credit for counsel fee of $7,500. to Alfred D. Bruce, Esq., at that time an associate of defendant, for services in connection with the settlement of the Estate of the said Alfred A. DuBan, deceased. If such fee was not paid, the plaintiffs are advised, believe and therefore aver that any claim of the said Alfred D. Bruce or of the defendant against the estate of Alfred A. DuBan, deceased, or against the estate of plaintiffs' decedent for the said sum of $7,500. is barred by the Statute of Limitations of the

Commonwealth of Pennsylvania in such cases made and provided.

18. The plaintiffs are advised and believe and therefore aver that the allegations contained in Paragraph 18 of the defendant's Counterclaim are so vague and indefinite as to not require answer thereto. However, the plaintiffs aver that the litigation in which the defendant became involved with the Federal Deposit Insurance Corporation was solely prosecuted by the defendant for his own use and benefit and any participation in that litigation by Mamie DuBan, either individually or as Executrix of the Estate of Alfred A. DuBan, deceased, was only as a nominal party and was only such as was requested by the defendant and which he deemed advantageous to him, in the endeavor by defendant to avoid payment of the judgment that had been obtained against him, as hereinbefore set forth and there was never any agreement or understanding by Mamie DuBan to pay any part of the counsel fees and costs incident to such proceedings and there was never made upon her by the defendant any demand for payment of any share of such costs and counsel fees during her lifetime. The plaintiffs, therefore, deny any liability of the estate of their decedent to pay any part or share of any of the costs or fees incident to such litigation as to which they have no knowledge.

19. The plaintiffs demand proof of the nature and extent of any legal services rendered by the defendant to the plaintiffs' decedent during the six year period prior to her death, and of the fair and reasonable value of such services, the plaintiffs not having sufficient knowledge or information to enable them to form a belief as to the fair and reasonable value of any such services because the means of proof of the nature

and extent of any such services are within the exclusive control of the defendant. As to any services alleged to have been rendered by the defendant to plaintiffs' decedent more than six years prior to her death the plaintiffs are advised, believe and therefore aver that any claim for such services are barred by the Statute of Limitations of the Commonwealth of Pennsylvania in such cases made and provided.

20. The existence of any such agreement is expressly denied.

21. The existence of any such agreement is expressly denied as well as any liability of the plaintiffs to the defendant in any sum whatsoever. Any liability for the first three items listed in Paragraph 21 of the Counterclaim are denied for the reasons hereinbefore fully set forth. Liability for the fourth item is denied except that defendant is entitled to credit for such amount as may be determined to be the reasonable value of the services rendered during the six year period prior to the death of plaintiffs' decedent. The fifth item in the amount of $1,500. alleged to represent "moneys advanced by the defendant in connection with tax, stamps, &c." is so vague and indefinite that such allegation is not susceptible of answer. Plaintiffs are without knowledge or information concerning said item, the means of proof thereof being within the exclusive control of the defendant and, if material, due proof thereof is demanded. Plaintiffs further aver that if the alleged advances were made more than six years prior to the death of plaintiffs' decedent and defendant has not heretofore been reimbursed therefor, any claim for such advances is barred by the Statute of Limitations.

22. Plaintiffs deny correctness of the legal conclusions contained in Paragraph 22 of the Counterclaim and further aver that the allegations contained

in said Paragraph are irrelevant and immaterial. The defendant having failed to return the 1,925 shares of National Dairy Products stock that he owed the Estate of Mamie DuBan on March 8, 1954, the admitted market value of which on said date was $126,087.50, is the amount plaintiffs are legally entitled to recover from the defendant. Plaintiffs are also legally entitled to recover from the defendant the sum of $1,443.75, the amount of the dividend declared upon said shares of stock on December 10, 1953. The plaintiffs deny that the defendant paid to the Estate of Alfred A. DuBan, deceased, or to Mamie DuBan individually, the amounts alleged in Paragraph 22 of the Counterclaim to have been paid by the defendant in the years 1938, 1939, 1940, 1941 and 1942. The plaintiffs aver that it was not until after November 20, 1942, on or about which date the 4,400 shares of said stock were transferred out of the name of Alfred A. DuBan by the Federal Deposit Insurance Corporation as hereinbefore set forth, that the defendant commenced to pay to Mamie DuBan sums equivalent to the dividends upon the number of shares from time to time unreturned by him to her and such sums were paid in acknowledgment and recognition by the defendant of his liability to do so until he returned all of said shares of stock to her, and such payments were not made as interest but to compensate and make whole the said Mamie DuBan for the loss of the dividends she would have received upon the shares of stock the defendant from time to time owed to her.

23. The existence of any such agreement is expressly denied as well as any liability of the plaintiffs to the defendant in any amount.

24. Any liability of the plaintiffs to the defendant is denied.

NEW MATTER.

25. By way of further reply plaintiffs aver that the alleged claims contained in Paragraphs 16, 17, 19 and 21 of the Counterclaim, except so much of the claim contained in Paragraph 19, as to which the defendant may be determined to be entitled to credit for the fair and reasonable value of services rendered to the decedent during the six year period prior to her death, are barred by the Statute of Limitations of the Commonwealth of Pennsylvania in such cases made and provided, to-wit, the Act of March 27, 1713, 1 Sm. L. 76.

EDWIN BOOTH,
BENJAMIN H. HELLMAN,
Attorneys for Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

W. L. Cleaves, being duly sworn according to law, deposes and says that he is Senior Trust Officer of the Girard Trust Corn Exchange Bank, one of the Executors under the Will of Mamie DuBan, deceased, one of the above-named plaintiffs, that he is duly authorized to and makes this affidavit on its behalf, and that the facts set forth in the foregoing Reply to New Matter and Counterclaim and New Matter which are within the personal knowledge of the deponent are true, and as to facts based upon the information of others deponent, after diligent inquiry, believes them to be true.

M. CLEAVES.

Sworn to and subscribed to before me this 12th day of April, A. D. 1954.

K. M. PIZZO,
Notary Public.

(Seal)

My Commission expires January 7, 1955.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

Florence Fisher Dunwoody being affirmed according to law affirms and says that she is one of the Executors under the Will of Mamie DuBan, deceased, one of the above-named plaintiffs, and that the facts set forth in the foregoing Reply to New Matter and Counterclaim and New Matter which are within the personal knowledge of the affiant are true, and as to facts based on the information of others affiant, after diligent inquiry, believes them to be true.

FLORENCE FISHER DUNWOODY.

Affirmed and subscribed to before me this 12th day of April A. D. 1954.

SAMUEL KLAMEN,
Notary Public.

(Seal)

My Commission expires January 19, 1956.

DEFENDANT'S COUNTER-REPLY TO PLAINTIFFS' NEW MATTER.

25. Defendant alleges and avers that the Statute of Limitations of the Commonwealth of Pennsylvania has no application to this matter because of the numerous promises and agreements by the decedent since 1938 and up to shortly before her death in 1953 to pay the defendant as set forth above and in Defendant's Answer, and also because the relationship between the defendant and decedent was one of mutual account to which the Statute of Limitations has no application, and defendant refrained from making a demand on the decedent on the basis of his agreement as set forth in paragraphs 15 and 20 of Defendant's Answer.

FURTHER REPLY.

Plaintiff in its new matter includes by way of reference Pars. 16, 17, 19, and 20 of its reply to defendant's counter-claim and the following paragraphs of reply are therefore so numbered. Because thereof defendant also feels a reply to Pars. 18, 21, 22, 23, and 24 is required, and the same is now done:

16. Denied that the estate of Alfred A. DuBan has ever been settled. This estate is a party plaintiff in the matters of DuBan, et al. v. Federal Deposit Insurance Corporation, and others, and until that litigation is disposed of the estate cannot be settled.

Mrs. DuBan made an affidavit that upon the settlement of the estate the attorney's fee, etc., would be paid. This affidavit was supplied to the Internal Revenue Office. Since April 12, 1946, Mrs. DuBan on many occasions admitted that the $4,115.50, as well as the attorney fee and other moneys due by Mr. DuBan

or his estate, or Mrs. DuBan had not been paid, and that she had promised to pay the same to defendant and she intended to see that the same were paid.

17. Denied. The return shows that the estate was represented by Alfred D. Bruce and Harry J. Alker, Jr., attorneys for the estate. All of the work was done by Harry J. Alker, Jr. Alfred D. Bruce was an assistant in his office and a nephew of Mr. DuBan. The fee was due Mr. Alker.

Mrs. DuBan made an affidavit which she furnished to the Federal Goverment in order that allowance might be made for these items in the settlement of the federal estate taxes, that the attorney's fee would be paid upon the final settlement of the estate. Settlement has never been finally made and therefore the statute would have no application. As heretofore stated, Mrs. DuBan from the time of the filing of such affidavit has promised that the same would be paid upon the final settlement of the estate. However, because of the agreement made by Mrs. DuBan and Alker whereby Alker agreed to pay her the dividends on the un-returned stock so long as she lived and not to present any claim against her estate or the estate of Alfred A. DuBan for the $7500. attorney fee or other moneys due by his estate, or make any claim for attorney's fees and expenses incurred for her and moneys advanced by defendant for her benefit if she released him from any claim for un-returned stock; she agreeing that she would only look to any stock, if any, recovered in the litigation. The Statute therefore would not apply.

18. Denied. On the contrary defendant avers that the plaintiff Mamie DuBan, Individually and as Executrix of the Estate of Alfred A. DuBan, deceased, was consulted on every move made and signed all papers.

Further, when she entered into the agreement of settlement with Alker it was distinctly understood as part thereof that if there was a recovery in the action against the Federal Deposit Insurance Corporation she was to have her pledged stock on such portion thereof as was recovered. (See paragraph 15 New Matter to defendant's answer). The action brought was also an action to restrain the National Dairy Products Corporation from transferring the stock of Mr. Alker and the certificates standing in the DuBan name. Mrs. DuBan as Executrix was therefore very much interested in the same.

The matter of the counsel fees and costs was by agreement permitted to run until the final conclusion of the suits. The DuBan Estate and Mrs. DuBan and Alker were all equally interested in the matter. The DuBan Estate and Mrs. DuBan would therefore be liable for their proportionate part.

19. Denied. The defendant alleges and avers that on many occasions since November 12, 1938, the defendant and the decedent discussed the nature and extent of the legal services that the defendant was rendering and had rendered to the decedent, and that on each of these occasions the decedent agreed and promised to pay the defendant the fair and reasonable value of such legal services. Many of these discussions and promises were made within six years before decedent's death.

The defendant further alleges and avers that the relationship between the decedent and defendant amounted to what is known as a mutual account, and naturally the Statute of Limitations has no application.

20. The defendant expressly alleges and avers that the agreement was such as is set forth in paragraphs 15 and 20 of the Defendant's Answer.

21. The defendant alleges and avers that the agreement is as set forth in paragraphs 15 and 20 of Defendant's Answer. The defendant further alleges and avers that on numerous occasions in the last few years and as recently as October of 1953, the defendant discussed with the decedent the various matters set forth in paragraph 21 of Defendant's Answer, and that on these occasions the decedent confirmed her agreement with the defendant as set forth in paragraphs 15 and 20 Defendant's Answer.

Defendant alleges and avers that the relationship between the defendant and decedent being that of a mutual account the Statute of Limitations has no application.

22. Denied. The defendant alleges and avers that he did not fail to return 1925 shares of National Dairy Products Corporation stock or that he owed any such amount of stock to the Estate of Mamie DuBan on March 8, 1954. Defendant alleges and avers that on the basis of the agreement with the decedent as set forth in paragraphs 15 and 20 of Decedent's Answer, he did not owe the Estate of Mamie DuBan anything on March 8, 1954, or at any other time.

Defendant further alleges and avers that he did pay to Mamie DuBan the amounts set forth in paragraph 22 of the counterclaim for the years 1938-39-40-41-42—such payments being a part of his agreement with the decedent as set forth in paragraphs 15 and 20 of Defendant's Answer. It is true that the 4400 shares of stock were not transferred by the Federal Deposit Insurance Corporation until after November 20, 1942, but the aforesaid payments have no relation to that incident. The payments set forth in paragraph 22 of the counterclaim were made on the basis of the agreement between the defendant and the decedent as set forth in paragraphs 15 and 20 of Defendant's

Answer, and were not any acknowledgment and recognition by the defendant of any liability in connection with the said 4400 shares of stock of the National Dairy Products Corporation.

23. The defendant alleges and avers that the agreement between the decedent and the defendant is as set forth in paragraphs 15 and 20 of Defendant's Answer.

24. The liability of the plaintiffs to the defendant is as set forth in paragraph 24 of the Defendant's Answer.

HARRY J. ALKER, JR.,
Attorney for Defendant.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

HARRY J. ALKER, JR., being duly sworn according to law, deposes and says that he is the defendant above named and that the facts set forth in the foregoing Counter-Reply are true and correct.

HARRY J. ALKER, JR.

Sworn to and subscribed before me this 3rd day of May, 1954.

ELIZABETH M. MARR,
Notary Public.

(Seal)

My commission expires 1/15/57.

PLAINTIFFS' INTERROGATORIES TO DEFENDANT TO BE ANSWERED IN WRITING UNDER OATH UNDER PA. R. C. P. 4005.

To Harry J. Alker, Jr., defendant

1. State the date, or approximate date, there was entered into between you and the plaintiffs' decedent, Mamie Duban, the alleged oral agreement to the effect that if you would pay promptly to the said Mamie DuBan each quarter an amount equal to the dividend she would have received on the unreturned stock so long as she lived, any further obligation on your part personally to return any stock then unreturned would terminate and cease, as averred by you in Paragraph 15 of New Matter.

2. State the precise place the alleged oral agreement referred to in Interrogatory No. 1 was entered into between you and the plaintiffs' decedent, Mamie DuBan.

3. State the identity and whereabouts of all witnesses to the alleged oral agreement between you and plaintiffs' decedent, Mamie Duban, referred to in Interrogatory No. 1, and the identity and whereabouts of all persons having any knowledge or information concerning said alleged oral agreement.

You are required to answer the foregoing Interrogatories separately and fully in writing under oath, to sign the answers and to file and serve the same on the undersigned within twenty (20) days after the service hereof in compliance with Pa. R. C. P. 4006.

EDWIN BOOTH,
BENJAMIN H. HELLMAN,
Attorneys for plaintiffs.

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' INTERROGATORIES.

And Now, October 30, 1954, comes the Defendant, by his attorneys, Edwin Hall, II, Hubert J. Horan, Jr., and Harry J. Alker, Jr., and objects to Plaintiffs' interrogatories filed October 21, 1954, for the following reasons, inter alia:

1. Because the information desired is not necessary for the Plaintiffs' preparation of their case;

2. Because the third interrogatory inquires of matters of hearsay testimony;

3. Because some of the information requested, appears in Defendant's answer;

4. Because of prior conduct of Plaintiffs and their agents, Defendant believes that it will cause unreasonable annoyance and oppression to his witnesses, a number of whom are beneficiaries under the will of Mamie DuBan, Deceased.

Edwin Hall, II
Hubert J. Horan, Jr.,
Harry J. Alker, Jr.,
Attorneys for Defendant.

DEFENDANT'S ANSWER TO PLAINTIFFS' INTERROGATORIES.

HARRY J. ALKER, JR., the defendant above-named, for answer to plaintiffs' interrogatories says:

1. The oral agreement in question was made shortly after Mrs. DuBan settled with George W. Heuer in the fall of 1949.

2. The oral agreement in question was entered into in Mrs. DuBan's apartment at the Cambridge, Alden Park, Germantown, Philadelphia, Pa.

3. The only witness to the oral agreement was Harry J. Alker, Jr.

The names and addresses of other persons having knowledge or information concerning the oral agreement are:

Mrs. Elva Bruce,
c/o Mrs. Betty Dopke,
2421 Arlington Road,
Roslyn, Pa

Horace S. Rhoads,
4 Central Road,
Ocean City, N. J.

Thomas J. Hookey,
1500 E. Mohican St.,
Philadelphia, Pa.

Miss Mabel L. Rile,
49 E. Belmont Ave.,
Ambler, Pa.

Mrs. Gertrude Ford (now deceased)
Prior to her death she told others.

Mr. George W. Heuer, Jr.,
Oakland Farms, Inc.
Fairview Village,
Montgomery County, Pa.

Mr. Charles C. Heuer,
631 Hamilton Street,
Norristown, Pa.

Miss Helen H. Hanson,
425 Lansdowne Avenue,
Yeadon, Pa.

Mrs. Josephine Struckmann,
Pottstown, Pa.

EDWIN HALL, II,
HARRY J. ALKER, JR.,
Attorneys for Defendant.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

HARRY J. ALKER, JR., being duly sworn according to law, deposes and says that he is the defendant in the above matter, and that the foregoing answers to the Plaintiffs' Interrogatories in the above matter are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 27th day of January, 1955.

HARRY J. ALKER, JR.

ELIZABETH M. MARR,
Notary Public.

(Seal)

My Commission expires 1 15 57.

ORDER.

And Now, to wit: March 27, 1956, it is ordered and directed that the depositions of the defendant, Harry J. Alker, Jr., be taken at his office, 1505 Land Title Building, Philadelphia, on Wednesday, March 28, 1956, at 10:00 o'clock A. M., such depositions to be offered at the trial of the case by the defendant, subject to any valid objection which may be made by the plaintiffs thereto.

By THE COURT,
MacNeille,
P. J.

TESTIMONY.

Philadelphia, Pa., March 27, 1956.

Before MacNeille, *P. J.*

Edwin Booth, Esq., Counsel for plaintiffs;

John J. Gilbride, Jr., Esq., Counsel for defendant.

RONALD C. MOORE, sworn.

By Mr. Gilbride:

Q. Dr. Moore, you are a medical practitioner here in this jurisdiction?

A. I am.

Q. Your office is where?

A. 1929 Spruce Street.

Q. Do you have one Harry J. Alker, Jr. as a patient?

A. I have.

Q. For how long a time?

A. He has been a patient of mine since 1943.

Q. What was the most recent time of your examination of Mr. Alker?

A. You mean in his current illness?

Q. Yes.

A. Yesterday.

Q. Will you tell his Honor exactly what findings you made? You made an examination of Mr. Alker. What were your findings and your observations?

A. As a result of his operation in October——

By The Court:

Q. October of what year?

A. '55. October 23 was the exact date.

Q. October 23?

A. That's right. I will try to keep away from technical terms as much as I can. He had a duodenal ulcer. And he has had that for many years. And they were compelled to operate on it because it had perforated. And as a complication of that he got pneumonia, a heart condition, a bladder condition, rheumatism, and also bleeding from the bowels and hemorrhoids. That was during his period of convalescence in the hospital. That is a matter of record in the hospital, corroborated by four doctors.

Now he was discharged—I don't know the exact date, but I think it was some time in January, with a strict injunction from both Dr. Ewing, who is medical director at the Pennsylvania Hospital, and myself, to go on limited activity in his office; in other words, about a couple of hours a day, and then go back home and rest, on account of this very serious heart condition which any nerve shock or excitement may prove fatal to him.

So, therefore, he has had to be watched constantly by both Dr. Ewing and myself to guard against any severe nerve shock such as being in court or proceedings like this. He can take care of routine office work, but that is his limit.

Q. Well, what makes you think this would be very severe upon him, to just testify to the truth? That usually eases a man up, if anything.

A. Pardon?

Q. I say a man telling the truth isn't irritated or agitated, is he?

A. No. That is true.

Q. And I am assuming that a man testifying under oath will just be telling the truth and there is nothing exciting about that.

A. These things in court always bring a certain nerve reaction. You know that better than I can tell you.

Q. Well, I don't know. I see very strong people take the witness stand. It looks to me as if nothing would scare them or make them nervous.

By Mr. Gilbride:

Q. Doctor, will you go into more detail on the question of this heart condition?

A. Yes. Let me get the exact diagnosis here for you. He had what they called at the hospital an auricular fibrolation, which is an abnormal condensation of the heart and auricles which did not go through to the ventricles. And therefore, excitement could prove very detrimental and possibly fatal.

By The Court:

Q. Well, do you think merely coming to tell his story, since he is going to tell the truth, will excite him? He has been used to courtrooms and things of that sort.

A. Yes, he has. That is his business.

Q. Quite used to it.

A. But I am afraid now, in view of the condition that he had and all these complications plus the fact that he is a little older than he was, that I think it would be very detrimental.

Q. Do you know what his age is?

A. I believe he is seventy-one.

By Mr. Gilbride:

Q. Doctor, have you arrived at a prognosis in this case?

A. Yes. If he leads a quiet life and is not given any excessive nerve shock or anything like that and permitted his routine office work with limitations and plenty of rest along with it, he should be moderately recuperative within a month or so that he could undergo anything like that. In fact, I so stated in my letter.

Q. Would you say within two months he would have a fair recuperation under all the circumstances?

A. I would say so.

Cross-Examination.

By Mr. Booth:

Q. What is your specialty?

A. General medicine and eyes, both.

Q. And eyes?

A. Yes.

Q. Mostly in eyes?

A. Both.

Q. Right?

A. What is that?

Q. Mostly you are a specialist on the eyes, aren't you?

A. I said partly.

Q. Do you know anything about his actual activities?

A. Only to the extent that we told him, both Dr. Ewing and myself—we had to restrict him.

Q. Do you know, as a matter of fact, whether he goes to his office every day?

A. He has been going to his office, yes.

Q. And do you know that he walks the streets?

A. We ordered him to get some exercise at lunch-time; to go outside of the office for lunch.

Q. Do you know that in the course of his business he moves from one office to another in the City of Philadelphia? Has he explained that to you?

A. That I do not know.

Q. You don't know that?

A. No.

Q. Mr. Alker has been, what we might say, an ill man for many, many years, hasn't he?

A. Yes, he has.

Q. And his condition today is not much different from what it was some years ago, is it?

A. It is; much more serious.

Q. You mean it is getting worse?

A. Yes. By virtue of his operation.

By The Court:

Q. When was the operation, Doctor?

A. October 23, 1955.

By Mr. Booth:

Q. Well, he got over that, didn't he?

A. I pointed out here, and they have it in the notes, all the complications that arose.

Q. Well, a man of seventy-one who undergoes an operation of the kind you described has more or less shock, doesn't he?

A. That's right.

Q. And it has some effect on his heart?

A. That's right.

Q. Certainly. And that is just what happened here. It is just about the usual condition, isn't it?

A. No. The pneumonia had more of an effect on his heart and also left spots on his lungs which are permanent.

Q. When were those spots discovered, after the operation?

A. By x-rays. I said it was a complication after the operation.

Q. Were they there before or after the operation?

A. After.

Q. Not before?

A. No.

Q. Do you know that of your own knowledge?

A. It is on the record of the Pennsylvania Hospital.

Q. I mean of your own knowledge do you know it?

A. From physical examination they were not there before.

Q. From your examination?

A. That's right.

Q. Is there any reason why he could not sit down quietly in his office and have his testimony taken by a stenographer in his office?

A. Well, I have tried to point out that he shouldn't have any nerve shock for an additional thirty days.

By The Court:

Q. Then do you think he should be in his office at all?

A. Well, he has to make a living.

Q. Well, he is there for the purpose of tending to his business and this is certainly a part of his business. The case has been in the courts since 1954, hasn't it?

Mr. Booth: '54.

The Court: How long was it in existence as a dispute before that?

Mr. Booth: Only since the decedent's death, and she died November 7, 1953. Up until that time he had paid her the dividends. When she died he stopped.

The Court: Well, I think it is very important to have the case disposed of.

Mr. Gilbride: May I say, if your Honor please, that the doctor has pointed out the results of his findings, and he says there is a prognosis here of about several months, one or two months. And my application for the motion for the continuance at this time, in view of the doctor's testimony, is for two months.

The Court: You would have the same thing at the end of thirty days.

Mr. Gilbride: Well, at this point my application is for the two months.

The Court: A few months?

Mr. Gilbride: Two months. I didn't say a few. I said two at the most.

The Court: Well, unfortunately the last time, which is several years ago—I don't know how many now—Mr. Alker was apparently in the same condition. And he was in his office. At least we found that out. And I sent a couple of court officers over to accompany him and see that he got across the street safely and so forth. And he got over here. And in a little while I discovered something in the case that made it, after all, very simple, and we got rid of it and removed all that worry from him. At that time he was a very worried man and I thought we ought to do something to relieve him of the worriment. Now it proved very beneficial to him because in a very short while that burden was off him altogether. But we had to take heroic measures at that time so as to get him in a better condition so he wouldn't be worrying himself so much. I think that the kind of worriment he goes through would kill him, yes. But he ought to get it off his chest.

I can't see that it is going to excite this man very much to come here and tell the truth. Do you think that will do it? He is working in his office.

The Witness: Well, I know he has this heart condition now. Dr. Ewing can tell you that down at the Pennsylvania Hospital. And it is on the record as well as my statement.

By The Court:

Q. Is there anything else you want to tell us, Doctor?

A. That is all I have.

The Court: Do we have the other doctor here?

Mr. Gilbride: No, I do not.

The Witness: He is medical director at the Pennsylvania Hospital and he can't get away. He is in charge of the whole hospital.

Mr. Gilbride: But I submitted to your Honor the statement from the hospital, which was the best under the circumstances that I could get.

The Court: Well, I have seen him walking through the streets within the last week, and he seemed to be pretty well then. And he is very active. He was walking with a good step. Would he be apt to do that in the condition he is in?

The Witness: He can't hurry. He has to take his time. If he tries to hurry or do anything——

The Court: Well, he wasn't hurrying.

The Witness: He can't do it.

The Court: I think it was Saturday a week ago probably. And he came out Walnut Street, turned up 16th Street and stopped and admired the candy in the window and so forth. Then he started in one of the doors and after a little while he didn't go in the door, but he came out and went right up the street. I am not very strong myself. It took a little effort for me to watch it. I had to move along a little bit in order to see. I didn't know anything about this case coming up or anything else, but I was just interested and I thought maybe I ought to take a little interest because of the experience that we have had.

By The Court:

Q. I don't think that taking depositions in his own office ought to hurt the man at all, do you, Doctor?

A. Well, it is still an element of nerve shock there.

Q. Well, if he is tending to business and tending to clients why can't he just sit there and tell the truth about this thing? He probably thinks he has a perfectly good defense. Do you think under those circumstances it would hurt a man to tell the truth about something?

A. Well, I think it is the wrong time until he gets a better recovery. That is the whole thing. That is what Dr. Ewing and I both stated.

By Mr. Gilbride:

Q. Doctor, do you think that after a period of a month Mr. Alker could submit to the depositions?

A. That is what I said in my letter.

Q. Doctor, do you know of your own knowledge is there a nurse in attendance with Mr. Alker?

A. Yes, he has a nurse in constant attendance with him.

The Court: He didn't have her with him the day I saw him.

The Witness: She is with him all the time.

The Court: She wasn't with him that day.

Mr. Booth: He walked over the Girard Trust Company the other day under his own power attending to business.

The Court: I think it is quite clear that it won't hurt this man in the quiet of his own office to take depositions. Counsel on the other side is a gentlemen. He won't bully him or anything of that sort. He will just give him a chance to tell his story. I see no reason why that shouldn't be done. And I don't see why it couldn't be done in the hope that the case will be tried on this list. It is getting to be an old case now.

Mr. Booth: That's right.

The Court: And it is very important to get this story out of him. After a bit he would die and the other side couldn't even speak the truth then. There is every reason why it should be attended to. I don't see why we can't have those depositions taken. I don't see why those depositions can not be taken and finished between now and Friday. You had better arrange to let him keep his decks clear so that you can begin your depositions at 10 o'clock tomorrow morning. Do you want to take them in his office or do you want him to go to some other office?

Mr. Booth: I will take them anywhere. I will go to his office.

Mr. Gilbride: I am not prepared on that at all, if your Honor please.

The Court: What is that?

Mr. Gilbride: I merely listened to the testimony of Dr. Moore here.

The Court: I have to make the decision. He simply advises us and tells us what he believes about it. I have to take the responsibility. And I think that it won't hurt him if you go in that office and let him get this thing off his chest. He probably believes he has a good defense and there is no reason why it won't help him to get rid of it.

Mr. Gilbride: If that is your Honor's order, that's it.

The Court: Yes, that is.

Mr. Booth: All right. Then tomorrow morning at 10 o'clock in his office——

Mr. Gilbride: Well, I am merely here to present this motion for the continuance. Mr. Allen is from Mr. Alker's office.

The Court: Get Mr. Alker to come over and speak for himself. He is able to walk around. Get him to come over here if you can't speak for him.

By Mr. Gilbride:

Q. Doctor, is it your point that there is a big difference between walking around in accordance with your instructions on the street or quietly in his office as compared with the atmosphere of a court proceeding?

A. Oh, yes, decidedly.

By The Court:

Q. What is that?

A. There is a decided difference.

The Court: Of course there is. He is out in the nice open air when he is strolling along the street. When I saw him the sun was shining. And I suppose he was doing it for recreation. I don't know. There wasn't much for him to do on Saturday afternoon. I know there wasn't much for me to do.

Mr. Booth: Then, sir, we will take his deposition tomorrow and then when can we come in for trial on this case?

The Court: You had better get a formal order for me to sign for him to answer these depositions.

Mr. Booth: Then I will draw up an order, sir, directing that his deposition be taken tomorrow at 10 o'clock in his office.

The Court: That's right.

Mr. Booth: And that the case will be continued until when?

The Court: It will have to be continued until you get your deposition and then let us know what the situation is, and if we have a day open we will fix it on an early day.

Mr. Booth: All right, sir.

DEPOSITION OF HARRY J. ALKER, JR.

Philadelphia, Pa., March 28, 1956.

Deposition taken upon Order of the Court (copy of which will be found on page 2 of this transcript) at the office of HARRY J. ALKER, JR., ESQ., 1505 Land Title Building, on the above date at 10 o'clock a.m.

Present: EDWIN BOOTH, ESQ. and BENJAMIN H. HELLMAN, ESQ., for Plaintiffs;

JOHN J. GILBRIDE, ESQ. and WILLIAM B. ALLEN, ESQ. and ISIDORE BAYLSON, ESQ., for Defendant;

HARRY J. ALKER, JR., ESQ., Witness;

FRANK WRIGHT, Notary Public;

HUBERT J. FRIEL, Official Court Stenographer, Court of Common Pleas No. 1.

DEFENDANT'S EVIDENCE.

(By agreement of counsel, signature of witness was waived.)

Mr. Gilbride: These are the depositions of the defendant pursuant to the Order of the Court as of March 27th, 1956, to wit:

"GIRARD TRUST CORN EXCHANGE BANK, et al., Executors — C. P. No. 1, March Term 1954, No. 973

vs.

HARRY J. ALKER, JR.

AND NOW, to wit: March 27, 1956, it is ordered and directed that the depositions of the Defendant, HARRY J. ALKER, JR., be taken at his office, 1505

Land Title Building, Philadelphia, Pennsylvania, on Wednesday, March 28, 1956, at 10:00 o'clock A. M., such depositions to be offered at the trial of the case by the Defendant, subject to any valid objection which may be made by the Plaintiffs thereto.

By THE COURT
/Signed/ R. MacNeille
/Typed/ R. MacNeille
P. J."

Now, on behalf of Mr. Alker, I enter a general objection and ask for an exception to the Order of the Court of March 27th, 1956 ordering these depositions.

Mr. Booth and Mr. Hellman and I stipulate that objections will be noted as we proceed, otherwise they will be marked passed, objections noted and the argument reserved. Is that satisfactory?

Mr. Booth: Except this, that I wish at this time to enter an objection to any testimony by the defendant, an adverse party, as to any matter, cause or thing, or any conversations that may have occurred before the death of the decedent, Mamie DuBan, who died November 8, 1953, feeling that he is entirely incompetent because of his being an adverse party, and I wish that objection to go all the way through and have it understood that that is our standard objection here, rather than being put to encumbering the record by objecting to any question that you might ask as to anything that occurred prior to the death of Mamie DuBan.

Mr. Gilbride: Very good. Well, the defendant takes the position that the disqualification has been removed by the pleadings in this case, specifically the interrogatories which were answered by the defendant on the 27th of January, 1955. Mr. Booth's objection

is to be noted on the record as going to the entire line. Now, we have covered the fact that the signatures to the transcript will be waived; is that right?

Mr. Booth: Yes, we have covered that.

Mr. Gilbride: Now, the defendant reserves to himself the right to further answer any testimony and if so advised by his medical examiners, to appear in court at the trial of the issues, if he so desires, reserving all right, as I say, to further answer any testimony.

Mr. Booth: I have no objection to his appearing in court, but I do have an objection to any lengthening out of these depositions. We were called here today to hear his deposition.

Mr. Gilbride: I did not hear that last part.

Mr. Booth: I said I have no objection to his appearing in court: If he does not want to offer the deposition in evidence at the trial, that is up to him, and if he wants to be there personally, he can be there.

Mr. Gilbride: Very good.

HARRY J. ALKER, JR., sworn.

By Mr. Gilbride:

Q. Mr. Alker, you have been sworn in this case?

A. Yes.

Q. You are the defendant in this action in C. P. No. 1, March Term, 1954, No. 973?

A. That is right.

Q. Now, in the course of this case you were served with interrogatories to be answered in writing under oath, under Pennsylvania Rule 4005; is that true?

A. That is right.

Q. In that first interrogatory, marked No. 1, this appears, and I will read to refresh your memory:

"State the date or the approximate date there was entered into between you and the plaintiffs' decedent, Mamie DuBan, the original oral agreement to the effect that if you would pay promptly to the said Mamie DuBan each quarter an amount equal to the dividend she would have received on the unreturned stock so long as she lived, any further obligation on your part personally to return any stock then unreturned would terminate and cease, as you averred in paragraph 15 of your New Matter." Now, pursuant to that interrogatory, you filed an answer, didn't you?

A. That is right.

Q. And as to No. 2 of the said interrogatories, I quote: "State the precise place the alleged oral agreement referred to in interrogatory No. 1 was entered into between you and the plaintiffs' decedent, Mamie DuBan", and you answered that, didn't you, under oath?

A. That is right.

Mr. Gilbride: Without further argument, it is our contention that that removed the disqualification of this witness.

Mr. Booth: My reply to that is that the answer to these interrogatories which merely called for him to state the date and place when the agreement was made, when the alleged agreement was made, does not qualify him to testify as to any conversation that he had with this decedent at any time prior to the date of her death either with reference to this agreement or any other matter connected with this suit.

By Mr. Gilbride:

Q. Mr. Alker, you filed an answer to the complaint in assumpsit in this case?

A. Yes.

Q. Your answer admitted the plaintiffs to be the Girard Trust Corn Exchange Bank and Florence Fisher Dunwoody, co-executors?

A. Yes.

Q. That was admitted. Mr. Alker, you are a member of the Philadelphia Bar, are you not?

A. I am.

Q. How long have you been practicing?

A. I couldn't tell you, but it was more than 40 years anyway. I couldn't tell you exactly when.

Q. You maintain your offices where?

A. I maintain the office here at 1505 Land Title Building and at 724 Swede Street, Norristown, Pennsylvania.

Q. During the years of your practice did you have as a client or did you know personally or otherwise Mamie DuBan?

A. I did.

Q. If you know, about when did she die?

Mr. Booth: November 8, 1953. I think we can agree on that.

Mr. Gilbride: Yes.

The Witness: Wasn't it September?

Mr. Booth: No; November 8, 1953.

Mr. Gilbride: That is right.

By Mr. Gilbride:

Q. What was her husband's name?

A. Alfred A. DuBan.

Q. Did you know him?

A. Very, very well.

Q. When did he die?

Mr. Booth: November 12, 1938. That is agreed to.

Mr. Gilbride: That is right.

By Mr. Gilbride:

Q. Did you represent Mamie DuBan in the probate of the Last Will and Testament of her husband, Alfred DuBan?

A. I did.

Q. How long had you known Alfred A. DuBan prior to his death?

A. Mr. J. Levering Jones, one of my old bosses, represented him for quite a number of years. At first I was an office boy and stenographer and then I studied law here, and while doing so I was sort of a handyman, in short. I continued here working as a lawyer and stenographer. Mr. Jones and I got along and I handled a lot of Mr. DuBan's work for Mr. Jones until Mr. Jones died, and from then on I can't recall whether Judge Beeber represented him for a time and I assisted, or whether both of us did. I just don't remember.

Q. When was the first time that you professionally represented Alfred A. DuBan or had any personal association with him? That is, you, yourself?

A. 1920.

Q. What was the nature of it?

Mr. Booth: You understand, I take it, that this is also subject to my objection.

Mr. Gilbride: Oh, sure.

The Witness: In 1920 Mr. Jones died unexpectedly or more or less suddenly, although he had been ill for quite a time, and Mr. DuBan had borrowed money from Mr. Jones and Mr. Jones had placed the loan in a trust that had been created for his wife.

Mr. Booth: Pardon me just a minute. I object to this.

The Witness: And he didn't have the money to pay it—you can eliminate this, if you want,—and that is where I came in, because Mr. DuBan sent for me and he said, "Harry, I am not in a position to pay the loan. You have to get time for me to straighten it out." I said, "Mr. DuBan, you don't have to worry about it." That was the beginning of my relationship with him.

Mr. Booth: I move that this all be stricken out as immaterial and irrelevant.

The Witness: Well, that is the way it came about and it was a big job for him, because he lived right up to all he made and he didn't have the money to meet the loan.

By Mr. Gilbride:

Q. Getting down to the substance of this suit, the question of securities, did you have any transactions with Mr. Alfred A. DuBan, with regard to any common stock of the National Dairy Products?

A. I did.

Q. When did it start and what was the nature of the transactions?

A. Well, as I told you, I have been out sick and I will have to get all that together and submit it to both sides, the evidence that there is, the dates and so forth. Well, the first was back sometime after 1929, when the market broke and Mr. DuBan had gotten me into pyramiding on National Dairy because of his great faith in it. He in the first instance, enabled me to get National Dairy, or rather, the old Supplee stock which became National Dairy, in lieu of a cash fee that I earned, and then he encouraged me to build up on that and he did it himself.

Q. Well, would you say specifically on October 10th, 1930, —

A. Yes, about that time.

Q. —about 700 shares of National Dairy stock were received by you as a loan from Mr. DuBan?

A. That is right. He had stock of mine and I had stock of his.

Q. What stock of yours did he have?

A. I would have to give you a statement on that. He had a loan at the Pennsylvania Company and he also had over there either guaranteed or put up collateral with George W. Huer on the loan.

Q. Who was George W. Huer?

A. George W. Huer was a very, very intimate friend of his who had the George W. Huer Coal Company in the Philadelphia National Bank Building and he was at one time quite —

Mr. Booth: I must move that this be stricken out as incompetent and irrelevant and immaterial to the issues in this case, which are clear-cut by the pleadings.

The Witness: And I had loaned a lot of my collateral to E. Waring Wilson and others, my friends and clients. Then National Dairy went down and then when I needed collateral, then I went to Mr. DuBan.

By Mr. Gilbride:

Q. Subsequent to that date of October 10th, 1930 was there any transaction between you and Mr. Alfred A. DuBan with regard to additional National Dairy Products Company stock?

A. There was.

Q. As a matter of fact, he loaned you 1,200 shares, didn't he?

A. Whatever it was, I will check it and advise both of you.

Q. Then again on November 24th, 1930 some certificates were again loaned to you? That was 1,400 shares; is that correct?

A. I will have to check on that.

Q. You cannot answer that?

A. I cannot answer as to the details.

Mr. Booth: Why don't you show him the receipts that are signed? They are attached to the pleadings.

Mr. Gilbride: I will take care of that.

By Mr. Gilbride:

Q. Let's look at Exhibits 1, 2, 3 and 4. Look at them and see if you recognize them. They are copies of exhibits in the complaint.

A. Well, if they have the originals of course—I don't recognize them. I don't remember them. I would have to get out all our old files. In 1930 Jones was dead and Beeber was not. If they have the originals——

Q. There were four occasions. Does your memory serve you when I ask you if there were about four occasions when securities were loaned to you by Alfred DuBan for a total of about 4,400 shares?

A. I would have to check the books. The last certificates were delivered by him to someone who acted as a go-between, William Fisher.

Mr. Booth: I object to that as certainly irrelevant and immaterial and also on the question of his competency to testify to it.

The Witness: It is very material in connection with the other litigation.

By Mr. Gilbride:

Q. The 4,400 shares of stock loaned by Mr. DuBan to you was for what purpose?

A. It was for the purpose of

Mr. Booth: I object to that.

The Witness: It was for the purpose of collecting the collateral at the Integrity Trust Company and the last one was for the purpose of securing an extension of time for the payment of the loan.

Q. You speak of the Integrity Trust Company. You had a loan with the Integrity Trust Company and as collateral or part collateral the securities loaned to you by DuBan were pledged: is that right?

A. They were pledged, yes.

Q. What was that last statement that you were making?

A. The Integrity called for additional collateral and I didn't have it and I went down to Mr. DuBan and Mr. DuBan sent for Mr. William F. Fisher.

Q. Who is Mr. William F. Fisher?

A. He is a manufacturer up on North 11th Street, right there at 11th and I think it is Vine Street. He was a large stockholder in the Integrity Trust and on its Board of Directors, a very influential member of the Board of Directors, and an influential member of the Finance Committee. Through me, Mr. DuBan knew him and knew him well. He sent for Mr. Fisher and told Mr. Fisher that he was willing to put up a thousand shares of National Dairy Products Corporation stock as additional collateral if the Integrity would extend the loan for 5 years and they would place upon my life a large term policy and I would pay the premiums and the interest regularly.

Q. What was the amount of the policy?

Mr. Booth: Just a minute. I object to that as immaterial and irrelevant.

The Witness: My recollection is that it was a $100,000 policy. I think it was in that amount. I could check to see whether is was $100,000 or $125,000. The insurance was placed by an insurance brokerage firm by the name of L. J. Santamarie.

Q. Did you ever have physical possession of that 1,000 shares in the last transaction?

A. No, I didn't have them.

Q. Were they delivered to you at all?

A. They were delivered to Mr. Fisher, who took them over and delivered them to the Integrity.

Q. Who delivered them to Mr. Fisher?

A. Mr. DuBan.

Mr. Booth: I object to that and move that it be stricken o

By Mr. Gilbride:

Q. At any time during the negotiations or transactions between you and Mr. DuBan did you ever pledge collateral with him?

A. Mr. DuBan had his own loan at the Pennsylvania Company and his loan became rocky——

Mr. Booth: I think that this is getting too far afield.

The Witness: And I got Mr. William Fisher to deposit with that loan $10,000 in Government bonds.

Mr. Booth: I object to this line altogether. It is incompetent and irrelevant and the witness is not competent to testify as to anything that happened during Mr. DuBan's lifetime.

Mr. Gilbride: In answer to that, may I say that I am not proceeding here haphazardly. My review of the pleadings in this case, considering

the general denials and oftentimes specific denials, indicate that this becomes relevant and very material. It is at issue. Mr. Booth's objection is noted.

The Witness: Do you want me to finish?

By Mr. Gilbride:

Q. Yes.

A. I know that Mr. William Fisher deposited as additional collateral over there $10,000 worth of Government bonds and I also was influential in getting the Hauptfuhrers to lend him collateral and I am positive that he had certain of my stock that was available then. I think part of that stock was over there. Then subsequently Mr. DuBan——

Q. Well, on that one point, can you be specific? Did he have any of your securities or not?

A. Well, he did. You will find it set forth in the answer, the number of shares that he had belonging to me.

Q. What were those securities, do you remember?

A. National Dairy.

Q. National Dairy?

A. Yes.

Q. How many?

A. And then——

Q. How many? How many?

A. I would have to check it. He had them in his possession, or with his loan, 775 shares which belonged to me, and then he applied that on account of the 4,400 shares. I also gave him as security 125 shares of Mrs. Smith Pie Company, which had very little value then, and I had a life insurance policy in the Metropolitan Life Insurance Company for $50,000 on which I had made a loan and the cash was used in connection with that, and I gave him that policy and

the pie stock as collateral. Well, the pie stock had very little value then. He had retired and I got him to go into the Pie Company because his income had shrunken so. He said he gave one day a week to it and he got $100 a day and the stock that he owned he got for services in that way. Bear in mind that I threw him lots of things and got him into lots of things where he made money.

Q. I don't want to clutter up the record, but you have talked about the time that DuBan had a loan at the Pennsylvania Company and additional collateral was called for it and was through your graces that certain collateral was obtained?

A. That is right.

Mr. Booth: This is certainly incompetent, irrelevant and immaterial.

The Witness: He moved the loan then to the Manufacturers' Trust Company.

Mr. Booth: And I move that it be stricken out.

The Witness: And I was going to say that he then returned to Mr. Fisher his $10,000 worth of bonds and he returned to the Hauptfuhrers their stock because Mr. MacInerney, president of the National Dairy, had the Manufacturers' take over the loan.

By Mr. Gilbride:

Q. Outside of the 125 shares of Mrs. Smith Pie Company and the 775 shares of National Dairy Products, did you return any of the other securities to Mr. DuBan?

A. I have forgotten whether they were returned to him or to her, but from time to time as fast as I could I bought National Dairy on the market and then

gave her or him the stock in reduction of the number of shares there were.

Q. Do you remember how many shares were returned to either Mr. or Mrs. DuBan?

A. I know it was down. I figure 1,925 shares.

Q. Down to that?

A. That is right.

Q. In other words, that represented remaining securities to be delivered?

A. That was the remaining number of shares that were involved.

Q. And then Mr. DuBan died?

A. Well, I didn't return them to him because I returned a lot of them to her, you know.

Q. Yes?

A. And it was important—because of the violation of the agreement by the Federal Deposit, it was important to keep the records right so that in the event of a recovery we would get from Mrs.——

Mr. Booth: I object to that and move that it be stricken out as incompetent and immaterial.

By Mr. Gilbride:

Q. After the death of Mr. DuBan, your business and professional relationships continued on with Mrs. DuBan?

A. Oh, yes, indeed.

Q. Personally and as executrix of the estate of her husband?

A. Yes.

Q. What happened to the 4,400 shares of National Dairy Products securities which we have under question here?

A. Well, they were appraised as part of the estate, whatever they were, and Mrs. DuBan inherited the whole estate and whatever was in the estate be-

Q. Now, what about the dividends?

A. The dividends Mrs. DuBan got. Until the stock was transferred, why, Mrs. DuBan got directly the dividends and after they were transferred by the Federal Deposit, then I paid her an amount equal to the dividends on the day the dividends were due.

Q. Why did you pay her the dividends after the date of the transfer of the securities from your name?

A. You mean originally?

Q. Well, I am now down to that point where you started to pay the dividends to Mrs. DuBan. Why?

Mr. Booth: I object to the question.

The Witness: I started to pay the dividends when the dividends stopped by reason of the transfer of the stock. The court granted an order on National Dairy to transfer the stock. Up until that time we had blocked it, and then I had started to pay that. I started to pay the dividends to her voluntarily.

By Mr. Gilbride:

Q. You mean that in your loan with the Integrity Trust there was a default?

A. No default.

Q. There was no default whatsoever?

A. The Federal Deposit—the loan had, was it two years, or approximately two years to run? The Federal Deposit Insurance Company testified that they had made a loan to the Integrity and taken this as collateral for their loan. Because of that, the Appellate Court held that the Federal Deposit Insurance Company was a federal agency protected by public policy and could repudiate any contract made by an insured bank.

Q. And these particular securities being part of the collateral were transferred?

A. They asked National Dairy to transfer them. National Dairy refused. Joe Gilfillan represented National Dairy, but the court held, under that public policy rule, that National Dairy had to transfer them, and when the stock was transferred, in view of the upset conditions, why, I did everything I could to do the right thing, and I did.

Q. When did the dividends stop? When did you stop receiving dividends of the National Dairy?

A. I didn't receive them. She received them.

Q. When was that?

A. I would have to look it up and let you know when National Dairy made the transfer. There is an armful of stuff and I had expected a few days to get ready. Ed Hall had it all arranged.

Q. Well, would you say it was sometime around 1944?

Mr. Booth: 1942.

Mr. Gilbride: All right, 1942.

By Mr. Gilbride:

Q. Subsequent to 1942, when Mrs. DuBan was not receiving the dividends, did you pay the moneys to her?

A. I paid the dividends on the day the dividends were due.

Q. Up until what period of time?

A. Well, up until the last dividend before her death.

Q. After the dividends were stopped being paid directly to her by National Dairy and then you tried to make the payments was there every any understanding between you and Mrs. Mamie DuBan with regard to that?

Mr. Booth: I object to any testimony by this witness, who is a defendant and adverse party,

about anything that occurred prior to the death of Mamie DuBan on October 8, 1953.

The Witness: What is the question?

Mr. Gilbride: Will you read the question?

(Pending question repeated by stenographer.)

The Witness: Was that before I started to make the payments?

By Mr. Gilbride:

Q. No. That was right down at the time—I will ask you whether at any time after you started to make payments of the dividends you and Mrs. Mamie DuBan had any understanding or agreement with regard to those securities?

A. We did.

Q. When?

Mr. Booth: Just a minute, Mr. Gilbride. I am wondering if we understand each other. Do you understand that my objection as to the competency of this witness as to anything that occurred prior to the death of Mrs. DuBan extends to all these questions that you are asking?

Mr. Gilbride: Yes. I took your comments to refer to the rule concerning dead men in its widest extension.

Mr. Booth: Right.

By Mr. Gilbride:

Q. I asked you when there was such an understanding or an agreement?

A. Well, I will fix it in this way: George Huer—George Anders and myself were indebted to her——

Q. Wait a minute; not so fast. Who is George Anders?

A. He was their family physician. He waited on Mr. DuBan and waited on her for many years, just like I was subject to his call at all times as a lawyer.

Q. And who is that third individual?

A. George W. Huer was sort of a protege also of Mr. DuBan. He was with Ristine and Company for many years and Mr. DuBan thought——

Mr. Booth: I object to this digression. It is getting the record out of all bounds. It is irrelevant and immaterial.

Mr. Gilbride: Let the record show that Dr. Ronald C. Moore is present here and is in attendance upon the defendant, Mr. Alker.

I note, Doctor, that you have just made a perfunctory examination of the defendant, Mr. Alker. May we proceed?

Dr. Moore: You might take it a little easy. Give him a few minutes recess.

Mr. Gilbride: Give him a few minutes recess?

Dr. Moore: Yes.

Mr. Gilbride: Any objection?

Mr. Booth: No.

(After a five-minute recess and upon the stenographer reading back the last testimony, proceedings resumed as follows):

The Witness: And Mr. DuBan had him frequently in his office.

By Mr. Gilbride:

Q. Had whom in his office?

A. Had Mr. Huer, and he took him to lunch and took me to lunch with him when he discussed finances.

Q. My question pertains to you and Mrs. Mamie DuBan. Was there at any time any understanding or agreement?

A. There was. I started to say that Mrs. DuBan sent for me and told me that she was——

Mr. Booth: I have an objection to this.

Mr. Gilbride: Put your whole objection in so that there will be no interruption.

Mr. Booth: I object to any testimony by this witness, who is the defendant and an adverse party, as to any matter, cause or thing, or any conversations that he may be alleged to have had with the decedent, Mamie DuBan, prior to the date of her death on November 8, 1953. I take it that counsel for the defendant agrees that this objection shall apply to any and all testimony that might be offered by the defendant as to anything that occurred prior to the death of Mrs. DuBan. Am I correct?

Mr. Gilbride: Well, I don't agree with your objection. I oppose that. However, it applies to the whole line of the testimony.

Mr. Booth: Right.

Mr. Baylson: From beginning to end. You mean the defendant personally? You had not referred to any other witnesses the defendant might have?

Mr. Booth: That is right. The defendant personally is an adverse party.

Mr. Gilbride: May we go ahead without interruption now?

Mr. Booth: Yes.

By Mr. Gilbride:

Q. You say that Mrs. Mamie DuBan sent for you?

A. Yes.

Q. Won't you tell us when?

A. I will have to fix it by when she made her settlement with George Huer, which was around 1945 or 1946, or sometime thereabouts.

Q. What do you mean by "settlement with George Huer"?

A. She told me that she was getting her affairs in shape and that she was settling with George Huer, as to what he owed her and her husband's estate and so forth. George had been, prior to Mr. DuBan's death, more or less his financial advisor, and also after Mr. DuBan's death he had been an advisor to Mrs. DuBan. He advised her as to finances and securities and changes and what investments she had and so forth.

Q. To your knowledge, was there a settlement between Mrs. Mamie DuBan and Mr. George Huer?

Mr. Booth: Objected to as irrelevant.

The Witness: There was finally a settlement between them.

By Mr. Gilbride:

Q. What was the nature of the settlement, if you know?

A. I have forgotten just now, without looking at the records and the income taxes and so forth. I can look them up and advise you.

Q. I now refer you back to my question and ask you when did she send for you, referring to this conversation you had with Mrs. Mamie DuBan?

A. She sent for me when the negotiations were on and she also sent for me after she had closed with him, which she did herself.

Q. When was that? Can you give us a year? Can you give us the best of your recollection?

A. Without my looking it up, it was somewhere, I should say, between 1945 and 1948 or 1949, in there somewhere.

Q. She called you and what happened as a result of the call?

A. She told me the first time that she was settling.

Q. Settling what?

A. Settling with George. And then subsequently she advised me that she had settled and she of course told me at the time what settlement she had made because from year to year I prepared her income taxes and so forth, and wherever there was any question and so forth, I would discuss it with her, and after discussing it with her secretary——

Q. Well, did you and Mrs. Mamie DuBan have any conversation with regard to your transaction?

A. We did. Then she said she would settle with George and now she was going to settle with me and she would probably settle with Dr. Anders, as she wanted to get them all closed. There were two or three conversations. She told me that she had decided that if I would waive all claims against Mr. DuBan and Mr. DuBan's estate and so forth, she would

Q. Well, was there anything further that you were to do?

A. Yes. I was to pay her the dividends on the 1,925 shares, or whatever it was, that had not been paid back to her on this stock.

Q. For how long a time?

A. Until her death.

Q. Right?

A. She said that she was not interested any further in the principal unless some of it was gotten back in the law suit, and I said anything that came back in the law suit was to go to her. She told me that

she would return to me the pie stock and also return the insurance policy the next time she went to the box, and I thereafter continued to see that on the very day the dividend was due she got a check for the amount that she would have gotten had she gotten the dividend on the unpaid stock.

Q. Pursuant to that did the dividends continue to be paid in the amounts of moneys equivalent to the dividends?

A. They were paid to her up until the time of her death.

Q. By *whom?*

A. By me.

Q. You speak of debits and credits and charges for service and in indebtedness of the estate of Albert DuBan to you?

A. That is right.

Q. And Mamie DuBan and what have you. Are you in a position at this time to enumerate and give us a detailed statement on such liability of the estate of Alfred DuBan?

A. No, but I will be glad to furnish it.

Q. You will do that in due course?

A. Yes. And I want to say this, that subsequently she made a settlement with Dr. Anders. There was a suit pending. She had a difference with him sometime before and there was a suit pending and she directed me to discontinue it or satisfy the judgment, I have forgotten which, and settle with him and wipe that out.

Mr. Booth: I move that that be stricken out as immaterial and irrelevant.

The Witness: I did that as she directed. I only say that because it shows that all she was interested in was getting the dividends for life, just as she turned over stock to Mr. Dunwoody

and others, but she retained the stock in her name as long as she——

By Mr. Gilbride:

Q. So that I understand you, you say that that overture was presented to you by Mrs. Mamie DuBan?

A. That is right.

Q. That she was willing to settle affairs and strike balances, that for and in consideration of releasing the charges against the estate of her husband and herself——

Mr. Booth: I object to that.

Mr. Gilbride: I am asking him. I am confirming exactly what the witness stated. You want the record to speak for itself? Is that your point?

Mr. Booth: I don't want the witness led.

Mr. Gilbride: I am not leading the witness.

Mr. Booth: You asked him what the agreement was and he stated the agreement.

Mr. Gilbride: I am restating his testimony.

The Witness: I want to repeat, she told me——

By Mr. Gilbride:

Q. Well, let me ask you to repeat it. Just what was the substance essentially of that agreement?

A. The substance was that I was to waive all claims against her husband's estate and her and make no charge for legal services to any of them.

Q. Right?

A. And I was also to pay the dividends on the stock that had not been returned to her.

Q. National Dairy Products?

A. National Dairy Products, until the time of her death.

Q. Right?

A. And she cancelled all claims against me and that the estate had, or any of them.

Q. You mean referring to the return of the stock?

A. That is right. And she also agreed to return to me promptly the life insurance policy and the pie stock. She said she would get it out when she went to the box. Two or three occasions later she told me about it. She said "I haven't returned the stock or the insurance policy to you, but I haven't been to the box."

Q. Now, you say that Alfred DuBan during his lifetime, and then his estate, and then Mamie DuBan were indebted to you and you have presented here in your answer to the complaint a counterclaim and you say at this time that you do not have the details, but that you will afford a specific, detailed explanation of those charges within a reasonable time?

A. Yes. He had me render——

Q. You are not going into it now, are you?

A. No, but they were rendered not only to him, but to all members of his family.

Mr. Gilbride: That is all. Cross-examine.

Mr. Booth: We have no questions.

(Adjourned until Monday, April 16, 1956, at 10 o'clock A. M.)

Philadelphia, Pa., April 16, 1956.

Deposition taken upon Order of the Court at the offices of HARRY J. ALKER, ESQ., 1505 Land Title Building on the above date at 10:00 o'clock A. M.

Present: EDWIN BOOTH, ESQ., and BENJAMIN H. HELLMAN, ESQ., for the Plaintiffs:

JOHN J. GILBRIDE, JR., ESQ. and ISIDORE BAYLSON, ESQ., for the Defendant:

HARRY J. ALKER, JR., ESQ., Witness:
CHARLES B. HALTER, Notary Public-Court Reporter.

Mr. Gilbride: Mr. Booth, William Allen in Mr. Alker's office and myself have been working on this case. I personally was working with Bill Allen on Saturday until around one o'clock in the morning. I am informed that Bill Allen took the entire file home with him to work on the weekend.

I am further informed that yesterday, Sunday, April 15, Bill Allen was in an automobile accident and is now in St. Luke's Hospital, and the Mamie DuBan files are not here in the office. Of course, Bill Allen is not present and he is the main one working on that case.

Can we go over to Friday?

As a matter of fact, I will take a cab now and go up to St. Luke's Hospital and see if we can see him.

Mr. Booth: This case is specifically set before Judge MacNeille for April 25, and the plaintiffs'

must insist that the matter be disposed of at that time and cannot agree to any postponement of the completion of Mr. Alker's depositions and the transcribing thereof, that might be urged as a ground for continuance of the case on April 25.

Moreover, under the authorities it is clear that Mr. Alker is incompetent to testify as to any matters or things that have occurred prior to the death of Mamie DuBan on November 8, 1953, and that therefore he is incompetent to testify as to any contents of any books or records he might have in his possession, which purport to enumerate any services or disbursements made by him on the account of Mamie DuBan.

Moreover, it is well established that the books of a lawyer are not such books of account as are admissible in evidence in the attempt to prove any claim against a decedent's estate.

Mr. Gilbride: Not having had an opportunity of going through the files and not having the files here now, it may very well be that there will be other papers, copies of documents, and so forth that will in our opinion be admissible in evidence; not confined to books of entry.

Mr. Booth: Let me state this, Mr. Gilbride, we had April 9 for the taking of these depositions, and at your request the matter was continued until today, that is, April 16.

I do not wish to be captious or arbitrary about the matter, but I still will take the position that whatever further depositions of Mr. Alker are to be taken must be taken so that there will be time for transcribing the notes of testimony, so they will be available when the case is called for trial on April 25.

Off the record.

(Discussion off the record.)

Mr. Booth: On the record. There has been entered formally the appearance of Mr. Gilbride and Mr. Baylson and also Mr. Allen, if you say it has, but I never got any notice of it. The formal appearance entered for those two I know of. In what capacity Mr. Allen is acting I have no knowledge.

Mr. Gilbride: Bill Allen appeared in court the last day I was there.

Mr. Booth: Whether he has ever entered a formal appearance I don't know.

Mr. Gilbride: Could we make it ten o'clock on Friday?

Mr. Booth: I am willing that the taking of further depositions of Mr. Alker be postponed, at the request of his counsel, to Friday, April 20, at 10:00 o'clock A. M., with the distinct understanding and agreement of counsel for Mr. Alker that unless the depositions be completed at that time so that they can be transcribed by the Official Stenographer prior to April 25, 1956, that we proceed to trial without the notes of such further depositions.

Is that agreeable to you, Mr. Gilbride?

Mr. Gilbride: I think I can request the Court for the right to file those depositions if it is ten or fifteen hours later, to become a part of the record.

Mr. Booth: What I am asking you is, do you agree that if those depositions are not completed and the notes transcribed so that they are available on April 25, that we go on to trial without them?

Mr. Gilbride: I think we will have them.

Mr. Booth: Do you agree to that?

Mr. Gilbride: I think it is a fair and reasonable hope that we will get those notes and have them by Wednesday, if we don't have some unforeseen thing happen here.

Mr. Booth: I don't want any question of any unforeseen thing happening. I want you to agree that if those notes are not available on April 25, we will go to trial without them.

Mr. Gilbride: You mean I wouldn't have the right to ask the Court to have them made a part of the record under certain circumstances and explanations?

I would have the right to bring them in when they are transcribed. I don't want to be precluded from offering them if they are not ready by Wednesday, because the trial certainly can go on. The trial I intend to proceed with on Wednesday, the 25th, and I have the right to make an explanation to the Court, in case we don't have the depositions transcribed; and I will request that I can offer them as soon as they are transcribed and be made a part of the record in the case.

Mr. Booth: You have the right to make supplication to the Court, and whatever the Court will do I will abide by.

(Hearing adjourned until Friday, April 20, 1956, at 10:00 o'clock A. M.)

Philadelphia, Pa., April 20, 1956.

Deposition taken upon Order of the Court at the office of HARRY J. ALKER, JR., ESQ., 1505 Land Title Building, on the above date at 10:00 o'clock A. M.

Present: EDWIN BOOTH, ESQ. and BENJAMIN H. HELLMAN, ESQ., for the Plaintiffs;

JOHN J. GILBRIDE, JR., ESQ., and ISIDORE BAYLSON, ESQ., for the Defendant;

HARRY J. ALKER, JR., ESQ., Witness;

ALLEN KAPLAN, Notary Public-Court Reporter.

(By agreement of counsel, signature of witness was waived.)

HARRY J. ALKER, JR., resumed.

By Mr. Gilbride:

Q. Mr. Alker, you have been sworn here.

With regard to the latter part of your testimony at the last deposition on March 28, 1956, you were discussing an alleged oral agreement between you and Mrs. Mamie DuBan, and you mentioned that you were to pay all the dividends on the stock to Mrs. DuBan up until the end of her life.

A. That's right.

Q. What, if anything, did you do?

Mr. Booth: Just a minute.

Mr. Gilbride: Your objection continues to the whole line?

Mr. Booth: To the whole line of any testimony by the defendant as to any events, any

matter or conversations alleged to have been had with decedent Mamie DuBan at any time prior to her death. Of course, she had none after her death.

By Mr. Gilbride:

Q. Now, will you answer the question: What, if anything, did you do with regard to the payment of the dividends to Mrs. DuBan?

A. I agreed to pay her the dividends received up to the time of her death, and I paid each and every one, I think, on the very day it was due.

Q. Right up until the time she died?

A. Yes.

Q. Was there any discussion of this question of the insurance policy?

A. She agreed to return to me immediately my insurance policy and my Pie stock.

Q. The Smith Pie stock?

A. That's right.

Q. Now, on the question of the insurance policy, how was that to be kept in effect?

A. Why, I paid the premiums all the time, and I still pay them.

Q. You still pay them?

A. Yes.

Q. That policy is in effect?

A. Subject to a loan that was made before.

Q. Have you ever received the insurance policy returned to you?

A. No. She said she would give it to me just as soon as she went to her box.

Q. Do you remember about the time of that conversation, when she made that promise to return the policy?

A. It was all the time.

Q. I mean just about how long before death?

A. You mean in connection with it?

Q. Yes.

A. She mentioned it several times, that she hadn't been to her box.

Q. On this question of Mrs. Smith's Pie, did you have that stock returned?

A. Never been returned, either one. She said it was in her box and she would return both of them to me when she went.

Q. You set forth a counterclaim and you aver that moneys are due you for advances to Mr. and Mrs. DuBan during their lifetime and for services rendered.

A. That's right.

Mr. Booth: Let me renew my objection to any testimony by the defendant as to any services he may allege to have rendered to the decedent during her lifetime.

By Mr. Gilbride:

Q. Now, during the lifetime——

Mr. Booth: That applies also to any advances alleged to have been made by him on her account.

By Mr. Gilbride:

Q. During the lifetime of Mrs. DuBan and Mr. DuBan, of course you acted at times as their attorney. Did you have any other relationship with them, socially or business?

A. Oh, yes, sure.

Q. To what extent?

A. Well, I had to go there every Saturday night.

Mr. Booth: I ask that be stricken out as irrelevant.

The Witness: Every Saturday I went there, sort of open house and they expected me to be there and my sister, too.

By Mr. Gilbride:

Q. You say every Saturday night?

A. Yes.

Q. So that in addition to acting at times as counsel for Mr. and Mrs. DuBan, you were socially active and close with the family, is that true?

A. That is true.

Q. And did you have any other relationships with Mr. and Mrs. DuBan?

A. Oh, yes. He would want to discuss something with me——

Q. I am referring to general business relationships.

A. Oh, plenty of them.

Q. Both parties?

A. I just want to say that he would call up and about every other day, and say that he wanted me to meet him at the Manufacturers Club or over at the Midday Club, had luncheon, he wanted to discuss something with me, and I would drop everything and meet him.

Q. That pertained to business ventures aside from your relationship as attorney and client?

A. Yes.

Mr. Booth: Just a minute. I move that this testimony be stricken out as to any social or general discussions that the defendant may have alleged to have had with Mrs. DuBan or her deceased husband, prior to November 8, 1953, in connection with any services he may have alleged to have rendered or any social contacts that he may have had with them.

By Mr. Gilbride:

Q. Now, Mr. Alker, have you gone through the DuBan files, that is Mr. and Mrs., and have you a schedule of services which you have prepared?

A. I haven't finished going through them, but I have gone through a good part of them, and I have a partial schedule prepared.

Q. You prepared that yourself?

A. Yes, a memorandum.

Q. Now, will you start off, and you may use that schedule, if there is no objection, to refresh your memory?

Mr. Booth: Let me see it, will you please?

Mr. Gilbride: Surely.

The Witness: That is only partial. I have a lot of it in shorthand.

(Witness hands document to Mr. Booth.)

Mr. Gilbride: Dr. Ronald C. Moore is in attendance on Mr. Alker and we are taking these depositions pursuant to the order of the Court. Because of Mr. Alker's physical condition, the doctor is present here to watch him.

Mr. Booth: I want to ask one question here, and that is: If my understanding is correct, this memorandum from which Mr. Alker is now intending to testify, or refresh his recollection as to some matters, has been prepared by him within the last week or ten days and is not a record of any book entries that may have been made from time to time as the alleged services referred to or rendered. Am I correct?

Mr. Gilbride: They are not book entries, but this schedule is taken from the original documents involved and from copies of correspondence and documents. There was a very close application to the files and a complete examination of those files, which are still here, and may be inspected by either you or Mr. Hellman.

Mr. Booth: Now, I must object further on the ground that such a record is not evidence and the witness is depending on such a record which is entirely incompetent and irrelevant and not admissible in the claim by a defendant for services rendered to the decedent, during the lifetime of the decedent.

Mr. Gilbride: I am not offering the schedule into evidence. He says, the witness testifies that he has prepared this from an examination of the files and he is merely using it to refresh his memory. He is now going to testify from his own knowledge.

Mr. Booth: I want to object to any testimony by this witness as to any services or disbursements he may have alleged to have made for the benefit of Mamie DuBan and especially her deceased husband, Alfred A. DuBan, during the lifetime of either of these parties, on the ground that he is an adverse witness and making a claim against the decedent's estate, and is therefore under the Act of Assembly, entirely incompetent to testify.

Mr. Gilbride: Well, our position is that disability under the Dead Man's Rule has been removed here.

Now, may I proceed, subject to your objection?

Mr. Booth: Yes.

By Mr. Gilbride:

Q. Mr. Alker, when was the first time that you and Mr. DuBan became associated as client and attorney?

A. Personally, 1920.

Q. Will you testify, go ahead?

A. Prior to that time, Mr. J. Levering Jones had been his counsel and I was Mr. Jones' assistant and secretary, and everything else. At the time of Mr. Jones' death, however, so far as Mr. DuBan was concerned, was unexpected, and Mr. DuBan got in touch with me, he apparently owed Jones money, and he was not in shape to pay it.

Q. Will you use names instead of pronouns?

A. J. Levering Jones. I found that Mr. Jones had loaned DuBan the money, but he assigned the claim to a trust, under deed for his wife, Elizabeth M. Jones, and Mr. DuBan was very much exercised fearing he would call him at once for payment. And he was not in a position to pay it and he asked me if I would — if I couldn't get time. So I secured for him the time and arranged so that he could pay it when he was able to pay it, which he did. And from that time on, why, my relationship with Mr. DuBan was very close.

Q. Will you go on?

A. And from then on, I was at his beck and call, until the time of his death. The service was almost daily. For instance, he bought a large home up in Germantown, which ran into six figures. I handled that for him, preparing all the papers and attending the settlement.

Q. Can you place a date?

A. (No response.)

Q. Approximately?

A. I couldn't tell you the exact date. I'll have to check and let you know.

Q. You will check that and give us a date?

A. Right. He bought a large property at Derby and Atlantic Avennes, Ventnor, New Jersey, in which he invested more than $125,000. He contracted to make a lot of improvements which ran into real money, and

difficulty arose over it, with either suits or threatened suits, and I handled that for him.

Then after a time he had, I think, well up towards $200,000 invested in that.

Rodman Wanamaker died, and Rodman Wanamaker had the biggest place in Ventnor, occupying a whole block, facing Atlantic Avenue; and Mr. DuBan was very anxious to acquire that and——

Q. Before you get into the Rodman Wanamaker matter, won't you give us a more detailed statement as to this Derby Avenue and Atlantic property transaction, in Atlantic City? Just what did you do there?

A. Well, I prepared all the papers and attended the meeting, and then I handled the differences he had with the contractor or contractors over it, and finally I effected a settlement for him.

Q. Now, that involved what, you say, over $125,000?

A. Oh, yes, surely.

Q. Plus the construction contracts for improvements?

A. Yes.

Q. Now, down into the Rodman Wanamaker matter, will you continue?

A. He was anxious to acquire that and that was a $250,000 property, and he had me negotiating in connection with that. It was, of course, conditioned upon his disposing of his own, but the Wanamaker crowd changed their minds at that time, and that deal fell flat. But I handled all that for him.

Q. Can you tell us what work you did, your specific work?

A. The purchase price was in the neighborhood of $250,000. I thought it was $250,000. Well, various interviews with the executors of the Wanamaker Estate and with the attorneys for them, and also con-

ferences with Atlantic City men on the subject of disposing of Mr. DuBan's property.

Q. You mean the property on Derby Avenue was to be disposed of?

A. That's right. Then Mr. DuBan acquired a boat, which I think cost him $85,000. That was the amount that he invested in it, and I handled the purchase of that for him, attended to all the details. And then he bought the boathouse up at the Inlet for the boat and I handled that.

Q. You mentioned $85,000 on this boat.

A. I think the boat represented that. That is my recollection, something like $85,000. He had Caldwell's put the silver on. He entertained there, and when he was down there, why, and he did all the entertaining. I had to be there every Thursday, and confidentially I would get very seasick, even out in the water, but I had to be there, because there were very often business associates they had there, and he had me there on call.

Q. You spoke of his acquiring a boathouse.

A. He bought the boathouse and, I don't have it right here what it cost, it was considerable.

Then he acquired an adjoining lot, and I think that cost up between $15,000 and $20,000, but I handled that, all the papers and so forth.

And then there was a question of the employment of a captain to run the yacht, and a contract was prepared by me, of employment there. And also the captain occupied the property, while Mr. DuBan owned the furniture, part of which was in it when he acquired it and part of which he afterwards had.

Subsequently there was a difference between the captain and Mr. DuBan, and I had to handle that, and we finally got the captain out and a tenant in.

Q. What happened to the boat and boathouse after the death of——

A. Well, Mr. DuBan's death——

Mr. Booth: Wait a minute.

Mr. Gilbride: Off the record.

(Discussion off the record.)

Mr. Booth: Let's get him nailed down to the question of services he may have made and rendered to Mr. DuBan, which he has been testifying to, because I want to make a motion after he is through with that.

Mr. Gilbride: Well, it is not broken down that way——

The Witness: Well then, after Mr. DuBan's death, the boat and boathouse——

Mr. Booth: Just a minute. I want to object to any testimony by this witness as to any services he now alleges to have been rendered to Alfred A. DuBan, the deceased husband of Mamie DuBan, because any claim for services that he may have rendered to DuBan was a claim against DuBan's estate, and not a claim against the estate of Mamie DuBan, who died in 1953, whereas the husband died in 1938.

Mr. Gilbride: Well, that is correct, with one exception, that the liability against the estate survived, the estate of Mr. DuBan, survived to the estate of Mrs. DuBan.

Mr. Booth: If there was any claim against Alfred A. DuBan's estate for any services rendered him, that was against that estate.

The Witness: Which she assumed.

Mr. Gilbride: I haven't finished.

Survived to the estate of Mrs. DuBan, for two reasons. One, she assumed the responsibility. She admitted the responsibility and it was all part of the final agreement, which is the basis of a counterclaim in this case.

Mr. Booth: I object to that statement, even if it would be so testified by this witness.

Mr. Gilbride: So that becomes the position of this defendant, and it is relevant for our contention at this point.

Now, may I go on, subject to your objection?

Mr. Booth: All right.

By Mr. Gilbride:

Q. Go ahead.

A. The boat was there and the captain was being paid, and she was not using it. I finally got a man—I finally negotiated the sale of the boat for, I think, $8500.

Q. You still say that the price of the purchase was $85,000?

A. $85,000.

Q. Eight——

A. $85,000 was invested in it, I understood, originally, but boats were a drag on the market; and this boat was bought by the British Government, and I have papers in connection with it, which were voluminous. The boat went down on the way over; it was torpedoed. We were out of it then; we got our money.

Q. Go ahead. You arranged for the sale of the boat?

A. Sale of the boat. That left the boathouse in the ownership of Mrs. DuBan, and I took up at her request, immediately, the matter of disposing of the

boathouse and lots. Finally we negotiated a sale of that.

In the meantime, the property was occupied by a tenant, who I believe was the chief of police of Atlantic City, and there was a lot of difficulty in getting him out and getting where we could deliver possession.

Then there was a dispute about the contents. I finally effected the settlement for the boathouse, and also sold the contents separately for her and the money she got, for which she was most grateful.

Then the matter of the house at Derby Avenue, that also was a dreg on the market, because in 1938 and the Forties, nobody was buying big houses like that, and Mrs. DuBan was not going down, and it was standing there.

So I finally, with the assistance of agents in Atlantic City, effected a sale of that and got her out of that, netting her all cash.

Now, the title to the property at Derby Avenue had been put in their joint names, and because of that, after the sale there was considerable difficulty with the Internal Revenue Department in determining what the loss was on the property, and there were long hearings and protests and everything else in connection with it. And I finally got that closed.

Q. Was that the only time during your relationship as attorney and client to either Mr. or Mrs. DuBan, or both, that you had tax problems?

A. Oh, I had them every year, because of his dying when he did, and a question on the matter of the boathouse. There was also costs and establishing the actual loss. Then there were other problems as to dependencies and all sorts of problems every year, like anybody that has any income or had any income at that time.

Q. As you go through this testimony, are you in a position to give us more detailed statements as to the specific services rendered, the time element involved?

A. I can do that. It would take me some time. I did this the best I could, because I am not working full time.

Q. Don't make a general statement: make it as specific as you can.

A. Now, Mr. DuBan owned a property out on Pennock Avenue, 139 Pennock Avenue.

Q. Before you get to that, did you have any attorney relationship with Mr. DuBan with regard to the Freihofer Vienna Bakery?

A. Yes, I did. Mr. DuBan was thinking about buying that, and in fact negotiated for its purchase, and I prepared the papers and so forth, but he never closed the deal.

Q. What was that transaction?

A. The Vienna Bakery was up there at, I think, 21st and Arch. It is now. I have forgotten the name of the bakery now—Fleischman.

Q. How extensive a business organization was it?

A. It was a good-sized one. I don't have the papers right in front of me now. I have them.

Q. What services did you render in connection with the negotiations for the Freihofer Vienna Bakery?

A. Prepared the preliminary papers, and so forth. I did the same thing with Mr. DuBan—he was endeavoring to put the laundry people together in Philadelphia——

Q. No. Getting back to this Freihofer Vienna Bakery, was there a capital structure involved?

A. All the details that would have been involved in the acquisition of a bakery, but it didn't go through. Capital stock returns, examining those——

Q. What was the next relationship of attorney and client that you had with Mr. DuBan?

A. Well, he also——

Q. Was there anything in connection with the Alfred DuBan Scholarship Fund?

A. Yes. He had me prepare a form of scholarship fund. He was going to create a scholarship foundation, and he had me prepare all the papers. I got various samples from different organizations. And then after I had done it, he changed his mind and didn't do it.

Q. What services, specific services, did you render——

A. Preparation of papers.

Q. How extensive was the time applied?

A. Well, it is a difficult job to study the form books and borrow forms from different ones who had forms, and I worked on it. His work was continuous. He had——

Q. Don't turn the papers, Mr. Alker.

A. He had a suit against a man by the name of Hewitt.

Mr. Gilbride: Off the record.

(Discussion off the record.)

The Witness: Mr. DuBan had acquired the property 139 Pennock Avenue, out in Upper Darby; and I not only handled the purchase of that, but also the sale of it. His brother John Bruce died, and Mr. DuBan had me handle that estate. He was the executor.

Q. What was the extent of that estate?

A. I don't remember, but it may have run $40,000 to $50,000.

Q. You say Alfred DuBan was the executor?

A. He was the executor and I attended to all the work in the way of settling it up. And then Laura

Bruce, the wife, died, and I couldn't tell you the exact amount of the two estates, but the two estates together amounted to around there. I handled all that. Mr. DuBan was the executor there.

Then his brother Joe had domestic difficulties——

Q. Whose brother?

A. Mr. DuBan's half-brother. Joe had domestic difficulties, and I attended to those. I handled those for Mr. DuBan, and that revolved around the Municipal Court, up in the Municipal Court.

Q. You used various rent agencies; were they at the instance and request of Mr. DuBan?

A. Yes. I wasn't in charge of any of them. I was acting for Mr. DuBan. Then Mr. DuBan bought a bakery for his brother Joe and set him up in business down on the Black Horse Pike below Camden, and Mr. DuBan—it was quite a good-sized bakery—and Mr. DuBan had me attend to the acquisition of the property, and all the details in connection with its operation. It was not incorporated.

Q. Did you mention the investment involved there?

A. I would have to look it up, but it was a very considerable sum.

Joe, in addition to the assistance that he got from Mr. DuBan, had borrowed something like $18,000 from his uncle, Judge Jenkins, Theodore Jenkins, and at the time of Mr. DuBan's death—after Mr. DuBan's death, Judge Jenkins died with that outstanding.

I might say that Joe Bruce died very suddenly, and at that time I had a room at the Oxford, just up the street from Mr. DuBan's, because I had to go so much to Mr. DuBan's; he didn't come to town every day, and Mr. DuBan called me and told me that Joe had dropped dead, and that I was to be ready at six o'clock the next morning to go up to Joe's with him. Of course I went up there with him and assisted Mr. DuBan in arranging the funeral.

Then, I assisted Mr. DuBan in liquidating the business and straightening the matter out.

Q. Over what period of time did that take you?

A. I beg your pardon?

Q. Liquidating that business and closing the Joseph Bruce estate.

A. Unlimited time. He had moved his family down there, and we had to move the family from down there and dispose of the property, and so forth.

Q. But you can't give us an idea of the estate, the amount of the money involved?

A. Well, Joe's estate, personally, was insolvent, because Mr. DuBan was on the $18,000 obligation as endorser with Judge Jenkins. After Mr. DuBan's death, I managed to get the estate out of liability there, without paying anything.

Q. To Judge Jenkins' estate?

A. That was Judge Jenkins' estate.

Q. What was the amount of the assets in the estate of Joseph Bruce, approximately?

A. I'd have to get those for you.

Q. All right. Go ahead.

A. That was one of the difficult things after Mr. DuBan died, to escape it, and I have among my files a very, very nice letter from Mrs. DuBan thanking me so much for getting that adjusted.

Then Mr. DuBan — well, then his nephew, Warren Edgar, had trouble with his wife, his first wife, and Mr. DuBan had me handle that divorce which was a difficult one.

Then there was a question as to Warren Edgar's child. He had a child by the first wife, and Mr. DuBan asked me to handle that.

Then Mr. DuBan was connected with the Supplees as executive vice president, Supplee Wills Jones, and when he retired from there, why, all his relations, prac

tically, were let out—Warren Edgar was let out, and he had a brother-in-law, Jack Dunwoody, who was the husband of the eccentrix.

Mr. DuBan sent for me and said, "Jack is out of a job up there, and I want you to find another job for him."

So I secured for Jack a position with Phillips & Jacobs, the chemical people down on Race Street, whom he represented, and where he did very good work.

Later, there were domestic difficulties between Mr. Dunwoody and Mrs. Dunwoody, and Mr. DuBan would not permit me to represent her, and she wanted me to—Mrs. Dunwoody wished Mr. DuBan to have Jack fired from his job.

Mr. DuBan sent for me, and she had approached me, too, and he told me I was not to do it, and I was not to have anything to do with her. So they were not on very good terms, but then the Dunwoody girl, why, she has had two divorces, and I was brought in on those.

Q. Who brought you in?

A. Well, either Mr. DuBan or Mrs. DuBan—I don't remember when the first one was probably Mrs. DuBan.

Then Mrs. Edgar, who was another sister, why, I handled her affairs, and I didn't get out the file just to enumerate them, but I handled all those at Mr. DuBan's request, and also Mrs. DuBan's after Mr. DuBan died. She was the favorite sister of both Mr. DuBan and Mrs. DuBan.

Q. Did those services extend to Mrs. Edgar's estate?

A. Everything.

Q. Answer the question yes or no. What is your answer?

A. I prepared a will for Mrs. Dunwoody——

Q. No, back on Mrs. Edgar, did your services extend to her estate, too?

A. That is my recollection. I want to check. I mean there is a box——

Mr. Gilbride: We will take a couple of minutes recess.

(Short recess taken.)

By Mr. Gilbride:

Q. I want to go back here to page 2 of your schedule, at the bottom: Did you have any relationship of attorney and client with Mr. DuBan with regard to the J. Vaughan Mathews claim?

A. Yes, that was a matter down in Atlantic City. I told you——

Q. What was that?

A. The litigation over, or threatened litigation over, the improvements in the place, which amounted to considerable.

Q. Can you give the record an idea of how much was involved?

A. Oh, I think well up towards $100,000.

Q. That was settled, you say?

A. Yes, sure.

Q. Did you have any attorney and client relationship with Mr. DuBan with regard to the Congoleum-Nairn?

A. Yes, sure. The office had represented a man by the name of Charles Templeton, and he was the oil-cloth man, and he came to see me and asked me if I could introduce him to anybody that could merge the industry, and I took him to DuBan, and DuBan worked hard on it and had me assisting him in all the details.

In the middle of it, Mr. Templeton died, and the matter fell flat. Afterwards somebody else put it over and it appears on the Stock Exchange as—begins with "C"——

Q. Congoleum-Nairn?

A. That's right, the Congoleum Company. And I did a lot of work for him in connection with that. He was preparing agreements and working out the plans and financing, and everything else.

Q. Can you give us the time element there?

A. Oh, in conjunction with all your other work, it ran for months.

Q. Did you have any transaction where you represented him in this Smith Pie Company?

A. Oh, yes. An application had been made to the court for the appointment of a receiver for Mrs. Smith Pie Company. The Smith Pie Company's headquarters were in Pottstown. They owed money to the bank there, and the bank—they were big creditors—and Frank died, he was the attorney; and I finally applied for a receiver.

And Mr. DuBan, someone up at the bank referred them to me, and Dr. Porter who was head of the bank said that if I could find the management, that they would put up the money.

So I went to Mr. DuBan and took him the proposition, and Mr. DuBan agreed to assume it. And Mr. DuBan, with my assistance, was able to work out a settlement of the claims of all the creditors, form a new company, and he became—he took charge of it.

He had retired then, but he took charge with the understanding that he would go there one day a week, and then he got stock, a considerable block of stock. That is where it came from, and he got—oh, I have forgotten how much—got a salary out of it.

And I also got positions there for the children, for several of the children of Joe Bruce.

Q. Does your recollection lead you to any specific amount of profits or losses that DuBan sustained in that pie company venture?

A. He got $100 a day for his work, and then he also got the stock which he had in the company.

Q. It turned out to be quite a successful venture, was it?

A. Oh, it was very successful, that is, to him.

Q. What about this laundry company venture that you spoke about?

A. That's right. Mr. DuBan was working on a plan to merge the laundry companies.

Q. What companies?

A. The various laundries around town, and he was working on that. One of them was headed by George Kendrick, and he had me helping him with it. After an awful lot of work on it, why, Mr. DuBan, who was very temperamental, why, he got mad at the delay of some of them and just dropped it. Afterwards Layton Stradley put it over. I have forgotten what it is called.

Q. How much time did you apply to that?

A. I couldn't tell you. That ran for some months.

Q. How about the Southwark Manufacturing Company?

A. The Southwark Manufacturing Company was another company Mr. DuBan was very much interested in, and he had me assisting him in connection with that.

Q. What was that?

A. They are—they imported chalk and converted it into the bed of linoleum and other things. That was the bed of linoleum. That was among the many things, and Mr. DuBan, he got a salary and he used to have meetings—it was a family organization.

Q. Where were they located?

A. Their plant is at the foot of Winslow Street, Camden, New Jersey.

Q. Over how long a time did your services apply there?

A. That was all the time, because he had the meetings in his office and he expected me to come down there. It was a family affair. And he sometimes had the meetings up here.

Q. Well, months or years?

A. Oh, no, every month.

Q. I say, over what period of time?

A. Oh, years.

Q. How substantial a venture was it?

A. (No response.)

Q. How big a venture was it?

A. It was a matter of—well, I just can't remember, but I think Mr. DuBan got between $25,000 and $30,000 a year out of it for a good while, and so did—it was a family affair, and their officers got according to the earnings because they owned all the stock.

Q. Now, down to this point, throughout all these services rendered, it is your statement that they were done at the request of Mr. or Mrs. DuBan?

A. Sure.

Q. Mr. DuBan during his lifetime——

Mr. Booth: What is the answer to that; they were done at the request of Mr. DuBan?

Mr. Gilbride: Mr. and Mrs. DuBan.

By Mr. Gilbride:

Q. Now, with regard to those services down to this point, did you ever have discussions with Mrs. DuBan as to payment?

Mr. Booth: I object to that on the same grounds as before: he is incompetent.

By Mr. Gilbride:

Q. Down to this point, with regard to all those services rendered to Mr. DuBan, did you ever have any discussion with Mrs. DuBan as to payment?

A. Yes, sure. Mr. DuBan said he was going to take care of me when he died, if he didn't take care of me before.

Mr. Gilbride: Will you repeat the question to Mr. Alker?

(Question read by Reporter as follows:)

"Q. Down to this point, with regard to all those services rendered to Mr. DuBan, did you ever have any discussion with Mrs. DuBan as to payment?"

The Witness: No, I didn't have any discussions with her—oh, you mean while Mr. DuBan was living?

By Mr. Gilbride:

Q. No, after his death.

A. After his death, certainly. She was constantly telling me that she could never pay me for all I had done for Mr. DuBan.

Mr. Booth: I object to the question. I move that the answer be stricken out in view of the fact that the witness is incompetent, and I also wish to make this motion: I move that all of the previous testimony of the witness be stricken out because it is so vague and indefinite as to time, places, and the nature and character of the services rendered, and the hours consumed and the documents prepared, and is so involved with services rendered to other persons and to social contacts, that it is not possible for anyone to form any accurate opinion as to the value of the services alleged to have been rendered.

Mr. Gilbride: May I say, Mr. Booth, with the permission of Mr. Alker, you and Mr. Hellman and I could go over to the files and you could see the evidence on this stuff firsthand.

Mr. Booth: I don't want to go into that. He is not my witness.

Mr. Gilbride: I just make that as an offer.

The Witness: It took half my time, anyway.

By Mr. Gilbride:

Q. Now, refer to the list.

A. Shall I go on?

Q. Yes.

A. Mr. DuBan had borrowed money at the Pennsylvania Company. His collateral went off, and he had some of my collateral up with his loan. When it went off, he sent for me and I had no collateral unpledged that I could put up; but William F. Fisher was a very intimate friend of mine and knew Mr. DuBan very well, only through me, and he put up, at my request, $10,000 worth of City of New York bonds with Mr. DuBan's loan at the Pennsylvania Company.

The Hauptferers put up collateral and a couple other of my clients, who were friends of his. I got them to put up collateral.

Of course, then later, why, Mr. Fisher decided he wanted his bonds, and he must have taken it up with the Pennsylvania Company without my knowledge, and I took it up immediately and had him withdraw his request.

I received word that was after Mr. DuBan's death—that Fisher tried to get the bonds, because on November 2, 1940, as of the 31st day of October, 1940, Mr. Kurtz advised me, had advised me, that Fisher wanted his bonds. And then on the second of November, 1940, I was in touch with him, and I arranged for Mr. William Fisher to withdraw his request. Subsequently that loan was, I think, transferred. The collateral was all eventually returned to those whom I had put up collateral.

Q. Of these various associations here with you and Mr. and Mrs. DuBan, can you tell which were in the professional relationship category and which were strictly business between you and Mr. and Mrs. DuBan?

A. Well, they were all business, taking your business time, and they were all business transactions.

Q. I mean, were they aside from your relationship as attorney and client? Which ones were aside from the attorney and client relationship?

A. Well, they were all that, I mean, all professional. I waited on—he had me working for them and the family and everything.

Q. What about this Land Oil Company of Pennsylvania, do you remember that?

A. Oh, that is another matter out of which Mr. DuBan made money. I represented Robert Miller, the Register of Wills in Montgomery County, who had a son James, and James acquired a gas station in Norristown. Then he acquired a second one. And then I represented a couple of others who had gas stations, and I went to DuBan and suggested to DuBan that it might be a profitable thing for him to merge them.

So Mr. DuBan did merge them, I think something like six or eight, under the name of Spartan Oil Company, for which he was paid, and Mr. DuBan assumed the operation of them from his office, and he was making money out of them.

Then I don't know whether he read it in the paper or not, but he said the oil situation was getting tight and he was frightened to death, fearing that the oil station would lose their source of supply. So he worked out a sale of them, of the concern, and the concern is now the Standard Oil of Pennsylvania.

And Arthur Seegar, who was one of those that Mr. DuBan had operating under him, is the president of Standard Oil of Pennsylvania.

Q. Now, referring to your schedule, here at the bottom of page 3, will you refer to the schedule and go through it, please, starting with Helen Hanson?

A. Helen Hanson was a woman who worked for Mr. DuBan, and her father, I think, was interested in the baking industry, and that is how Mr. DuBan got her. She is still living, and she became paralyzed or something.

Q. What services did you render in connection with that?

A. She had to give up her job.

Q. What services did you render in connection with that?

A. She was with Mr. DuBan. Mr. DuBan took her securities and invested them, her good securities and sold them and put them into something else. And she had a claim against him and his estate for $17,000.

Q. What was the outcome?

A. Oh, there was oodles and oodles of correspondence——

Q. What was the outcome?

A. The outcome was that I settled with her for $1,000.

Q. Was this a——

A. It was very unpleasant and Mrs. DuBan, this woman tried to see Mrs. DuBan and Mrs. DuBan wouldn't see her. It was very unpleasant, but I finally worked her out.

And George Heuer, who had the Oakland Farms, ever afterwards provided her with free milk, in order to get the thing closed. And I have been sending her stuff ever since, because her condition is pitiful.

Q. Is there a claim against Mr. DuBan's estate from a Mrs. Somers

A. Mrs. Somers is a very good looking secretary he had, who succeeded Miss Hanson, and Mr. DuBan, in his heyday, had given her a block of National Dairy stock; and when he got hard up, he borrowed that from her.

Q. Did you settle that claim?

A. And then she subsequently announced her engagement to somebody else. When she announced her engagement—I think he was sweet on her—he got rid of her, and then the trouble started because she made her claim against him for this stock; and I finally settled that.

Q. Now, was there a claim of this estate against a Dr. Anders?

A. Oh, yes. Dr. Anders was Mr. DuBan's doctor, and he went to Mr. DuBan regularly. Mr. DuBan was a terrible cripple from birth, I understood, and Mr. DuBan encouraged Dr. Anders to pyramid on National Dairy, just like he did myself, and Dr. Anders borrowed money over at the Girard and——

Q. Was there a claim against Dr. Anders?

A. That's right.

Q. In the amount of how much money?

A. I'd have to look it up.

Q. About?

A. I think something like $10,000, but that is a guess.

Q. How was it climaxed? How was it disposed of?

A. The securities were pledged over to the Girard for a loan, and the Girard called, when the market went down. After Mr. DuBan's death, why, the Girard called on the doctor for more collateral, and of course the doctor wasn't in any position to put it up. In order not to upset Mrs. DuBan, I put up $1,000 on one occasion. Then the market went back and Girard returned that $1,000 to me. I just put it

up temporarily. Then subsequently more had to be put up, and I put it up. I didn't disturb Mrs. DuBan about it.

Later, Dr. Anders—Mrs. DuBan got put out with Dr. Anders for some reason or other, and she had me institute suit and secure judgment.

Q. Then what happened?

A. And then long afterwards she had me—she called me on the phone and told me she had decided to order me to mark it settled, discontinued, and ended, that Dr. Anders had rendered unlimited service to Mr. DuBan and her, after he died, and that she was settling with him and wanted that thing wiped out.

Q. Mr. Alker, Dr. Moore says that is all at this time.

A. So I discontinued it, marked it as satisfied.

Mr. Gilbride: Off the record.

(Discussion off the record.)

By Mr. Gilbride:

Q. Will you continue, Mr. Alker?

A. Mr. DuBan had another lady friend, Margaret Baumgartner. He told me she was his cousin, but it developed afterwards that she was not. And he purchased for her a house in Ventnor or Margate, some distance below his own; and I attended to the purchase and preparation of the papers and everything.

Then after he died, there was some claim made there, which I got adjusted and avoided any noise.

Q. Was there a claim against a Howard Holm?

A. He had a claim against Howard Holm, and I finally, I think, collected that.

Q. What was the amount?

A. I don't remember. In fact, I don't think that was finally settled until after Mr. DuBan died, because Holm agreed to pay it in installments and he

failed to keep his word. So it was a case of dunning——

Q. Was there a claim against a Meyer Schamberg?

A. Meyer Schamberg was another one that Mr. DuBan had trouble with, and Schamberg was represented, and that claim, I think, was considerable; and I finally got a settlement in that.

Q. Will you continue?

A. Off the record.

(Discussion off the record.)

By Mr. Gilbride:

Q. What was the Meyer Schamberg case?

A. I have forgotten now just exactly what it was. DuBan claimed that he owed him money, arising out of some business transaction. I think John Sindberg used to be in Schamberg's office, but I have forgotten who the attorney was who represented Schamberg.

Q. Did you render services in that case?

A. Oh, yes, indeed. It was finally settled.

Q. Was there a claim of the Alfred DuBan estate against Hewitt?

A. Yes. I can't remember. That was not a large one.

Then there was another one against a woman by the name of Blanche Peters, and I think that was cleaned up after Mr. DuBan's death.

Then in 1945, the DuBans failed to pay their taxes on Massachusetts Avenue, Mrs. DuBan did, and the borough filed a lien and exposed them for sale; and I got that cleaned up.

Then there was a claim against a man by the name of Kramer, for damage to the Brookline property that Mr. DuBan had; and I cleaned that up.

Then Mr. DuBan hadn't made any personal property returns, I think, and that had to be settled.

Mr. DuBan was very anxious to be president of the Pennsylvania Salt Company, and he had me doing what I could to bring that about, and he would have been president had it not been that Mr. William P. Gest, head of the Fidelity Trust which held a very substantial interest there, had already pledged himself to——

Q. Were there any legal services with regard to that?

A. Yes, running around and getting those especially heavily interested to go along on Mr. DuBan, but Mr. Gest had committed himself to this other man. He asked Mr. DuBan ultimately not to press his desire, and Mr. DuBan ultimately didn't do it.

Q. Was there any real estate transactions out in Brookline, from DuBan to Bruce?

A. Yes, I told you about that. He bought a property out there and he bought a second property. My recollection is that he conveyed one of them to, eventually to Alfred Bruce, and one of them to Alfred's sister, my recollection is; although maybe the mother was in on it first. Then he bought another lot. I handled all of it.

Q. Did you represent Alfred DuBan in the Sparton Oil Company case?

A. Yes, that was the Oil Company of Pennsylvania.

Q. Won't you go ahead? Will you continue?

A. I have already testified to that.

Q. Will you take the next item?

A. I also took to Mr. DuBan, and he worked on it, and had me assisting him, putting together the Diamond State Fibre Company and the Continental Fibre Company, and something happened. After a whole lot of work on it, why, he dropped that. It was afterwards—now, the Continental—what is the name

of it? It is on the big board. Continental and Diamond State afterwards merged.

I also took to him, took Mr. Mason to him, of the Mason-Heflin Coal Company, and Mr. DuBan was working on a merger of the Mason Coal and the Newton Coal Company. He had me do a whole lot of work to assist him on it; and then he dropped that also.

Q. How about the Lovekin Water Heater?

A. Mr. Lovekin happened to be a neighbor of my sister, and he had this water heater and he wanted to, I think, merge with someone else; and I took him there and assisted Mr. DuBan in connection with that.

Mr. Lovekin was also connected with the Welsbach Company, and Mr. DuBan also got in on that matter. Of course, I didn't do anything with that matter, but that is how he got in.

Then the people interested in the Textile National Bank wanted to sell and they came to me; and I took the proposition down to Mr. DuBan. After he got in, he had me doing a while lot of work to assist him. Whether he effected the sale, I don't remember.

Q. Well, were you paid for any of these services?

A. No, not a bit.

Mr. Booth: I object to that. Of course, all my other objections hold good on that.

By Mr. Gilbride:

Q. Now then, you have testified to a list of transactions and services rendered. Why haven't you made it more specific or detailed, as to hours and specific services applied?

A. Because frankly, I don't keep any hourly record. Some law offices do, but I never had the time. Maybe it's a smart thing to do.

Q. You are now under the care of a physician?

A. That's right.

Q. And you have undergone treatment at the Pennsylvania Hospital and your condition is extended during the past six months, is that right?

A. That's right.

Q. And longer?

A. Yes.

Q. Do you want to continue? Have you finished? This is your entire list?

A. There was a drug crowd that he had me helping him on, on a possibility of a merger there, but something happened—whether he had a difference with some of them or not—but after a whole lot of work on it, why, he dropped it.

I did all the usual services and rendered all the usual services in connection with an estate like this, including all the tax returns, and the Federal estate tax return, and hearing with the Internal Revenue Department afterwards, in an effort to get the Federal estate tax in Mr. DuBan's estate closed. I was never paid for any of that.

Mrs. DuBan made an affidavit to the Federal people that she intended to pay them.

Mr. Booth: I move that be stricken out.

The Witness: Copies on file—I have a copy of it.

Mr. Booth: The best evidence is the paper itself.

The Witness: You have to do that in order to get settlement, if your fees and your commissions haven't been paid at the time you are closed.

By Mr. Gilbride:

Q. Have you finished with the list of your services?

A. Warren Edgar, one of the beneficiaries, sold his property up around Jenkintown, or that section, and agreed to buy a new one; and Mrs. DuBan had me

attend to the transaction. He couldn't go through they wanted to have settlement on the purchase before the sale, so I personally made a loan and loaned him the money in order to effect it. That was done. Mrs. DuBan asked me to take care of it.

Q. Mrs. DuBan, you say?

A. Mrs. DuBan, yes. There have been services to all the family—every little thing that had to be done—Mrs. Alfred Bruce, I was called on and I didn't make any special note, unless corporation or other papers were involved.

Q. Do you have any other services listed at hand, at this time, to produce in your testimony, or are you finished?

A. I filed all the income tax returns at the time of death and had conferences and protests, and so forth.

I haven't yet completed going through ——

Q. Is it your thought to reserve the right to produce any further list of services?

A. I'd like to be able to make a list of it and submit it. And if these gentlemen want any further proof, I can give it to them.

Mr. Booth: I haven't heard any proof yet.

By Mr. Gilbride:

Q. Are you finished at this time?

A. Yes.

Mr. Booth: I move to be stricken out any testimony by the witness as to any claims for services alleged to have been rendered by him to Alfred A. DuBan or Mrs. Mamie DuBan, that have not been referred to in the counterclaim filed by him in the suit pending, and my objection goes to his entire line of testimony on the ground that he is incompetent, being a defendant and adverse party and

the claimant being the estate of a deceased individual.

By Mr. Gilbride:

Q. Have you placed a figure of the indebtedness of Mr. DuBan to you at the time of his death, as set forth in your Answer?

A. In the Federal estate return, it appeared at $4,115.50, and there was also set forth in the Federal estate return a fee of $7,500, and that fee Mrs. DuBan made an affidavit she was going to pay.

I have here a copy of the employment agreement, entered into between Alfred A. DuBan and Earl Kramer, which I prepared, and also——

Mr. Booth: Off the record.

(Discussion off the record.)

The Witness: I figured that $1500 a year was a reasonable charge for the services, or $22,500 in all, from 1938 to date. Those were services, other than the estate services, to Mrs. DuBan. I agreed to waive all that in consideration of her agreement.

Mr. Gilbride: All right. Thank you.

Mr. Booth: Of course, I move that be stricken out.

The Witness: Negotiations for the reduction of the settlement on Wayne Avenue, for Mr. DuBan.

And I also have from him a general power of attorney to appear for him before the Treasury Department in connection with his income taxes, which he personally was having trouble with.

In 1922, he had me arrange a satisfaction of the mortgage on his Wayne Avenue place. My recollection is that it wasn't due, but he wanted to satisfy it before maturity, and I worked it out.

Mr. Gilbride: All right. Thank you.

Mr. Booth: No questions.

Mr. Gilbride: That is all.

(Testimony closed.)

DEPOSITION OF ELVA BRUCE.

Deposition of Elva Bruce, an infirm witness taken on behalf of the defendant, at Roslyn, Penna., on Tuesday, September 13, 1955, at 2 o'clock P. M.

Present: Edwin Booth, Esq., and Benjamin H. Hellman, Esq., for the Plaintiff;

Harry J. Alker, Esq., for the Defendant.

Taking of the oath was waived at the time of the deposition, with the understanding that the witness would sign and certify to the transcript.

ELVA BRUCE, testified as follows:

Direct Examination.

By Mr. Alker:

Q. What relation were you to Mrs. DuBan?

A. A sister-in-law.

Q. Did she ever discuss with you any of her affairs?

A. Well, yes.

Q. When and of what nature?

A. Well, this is quite a story—let's chop it in half. I am going to tell you this as it happened as two old ladies would discuss something. I went to see her about something. Is it necessary to tell what it was?

Q. Go ahead.

A. When we got done the talk—what I had asked her, we were sitting there just gossiping and I noticed she had a davenport. It was a pretty red one—not a regular davenport, just more like a love seat. For want of something to say—I noticed a tear in it about so long and I said, "Oh, Mame, an upholsterer could do a wonderful job with that."

She said, "I can't afford to have anything like that done."

I said, "For Heaven's sake, why don't you go out to the guys that owe you money? What's the matter with Dr. Anders?"

She said, "Well, he's gone in bankruptcy and the lawyer has settled fifty cents on the dollar."

I said, "What's the matter with Harry Alker, why don't you go after him?"

And she said, "Harry, oh, no. We have been friends for too many years. I could not do anything like that to him. I am cancelling his debt." And then later on, as I went to leave, why, she said, "You know, I still hold his insurance policy, but I am going to return it to him."

"Well," I said, "Who pays the premiums?"

She said, "Why, he does."

I said, "As long as you feel the way you do, that's about the only decent thing to do."

She left me under the impression she didn't have very much money. Uncle Al hadn't left her very much.

Q. Did she cancel the claim?

A. Yes, she cancelled the claim of Mr. Alker. She wouldn't sell the stock. She couldn't afford to have the furniture repaired, yet when I was leaving she went into her bedroom and came back with her handbag. She had a roll—well, it was a roll with a rubber band around it. She handed me a dollar and said, "This is your cab fare."

I said, "Will you call a cab?"

"No," she said, "You can flag them downstairs."

We walked down the corridor and got on the elevator and she got in with me. Now, that was the extent of our conversation that day, and the only conversation I had with her.

(Discussion off the record.)

Mr. Booth: Now, go ahead Mr. Alker.

By Mr. Alker:

Q. Did she ever discuss the details of dividends or anything like that?

A. No, nothing.

Q. Nothing?

Mr. Booth: Was that the whole conversation?

The Witness: About money that is.

By Mr. Alker:

Q. Were there any subsequent words about it or me?

A. No.

Mr. Alker: Cross-examine.

CROSS-EXAMINATION.

By Mr. Booth:

Q. Mrs. Bruce, when was this conversation?

A. If you want the day or the date, I can't give it to you.

Q. Approximately what year was it?

A. I should judge about—about 1947. I was living——

Q. 1947?

A. Yes.

Mr. Alker: She is not sure of that.

By Mr. Booth:

Q. I am asking you to fix it as definitely as you can, the year this conversation was had.

A. I think it was 1947.

Mr. Alker: Now, wait a minute. She said——

A. I said it was 1947.

By Mr. Booth:

Q. To the best of your recollection.

A. It could have been 1948.

Q. It is important you fix the date as near as you can fix it. Is it 1947?

A. I think so, yes. Am I going to be hung if it is 1948?

Q. Nobody is going to hang you.

A. Well, I want to know——

Mr. Booth: Now, the witness has already fixed the date as 1947. You can question on re-direct.

By Mr. Booth:

Q. Now, what was the debt of Mr. Alker's that you were talking about?

A. What was the debt?

Q. Yes.

A. Well, all I knew, being a member of the family, those two men both owed Uncle Al money and he owed them money.

Q. How did you know that?

A. I knew because my brother-in-law—he used to come to discuss things with my husband.

Q. Did he discuss it with you?

A. I was there.

Q. Can you tell about the debt, what she was talking about?

A. No, I can't tell you that. May I say something right now?

Q. No, no, let's get the questions and answers right. Now, how old a woman was Mrs. DuBan at that time?

A. Nobody knew how old she was.

Q. She was 86?

A. I am the one that told them I thought that she was 86.

Q. Let's fix it at 86. She was then an elderly person.

A. Yes.

Q. What was the condition of her health at that time?

A. Well, I think very good.

Q. She wasn't confined to her room?

A. Oh, Lord, no!

Q. All right. When was the last time you saw Mrs. DuBan?

A. That was the last time.

Q. In 1947?

A. That is not the last time I talked to her.

Q. The last time you saw her?

A. That's right.

Q. And the time you had any discussion with her was in 1947 about Mr. Alker.

A. That is right.

Q. She didn't discuss any details with you as to this debt.

A. No, she didn't.

Q. Did she make any mention of the amount of the insurance policy that she was holding?

A. You know you have me. I am afraid to say anything. I am not a liar.

Mr. Alker: If you don't know, why—— Who would remember a date when you are sick like you are.

A. No. I don't think she did. She was holding an insurance policy as collateral which she said she was going to return to him.

Q. Did she say to you that Mr. Alker was paying dividends on this?

A. Yes, she did.

Q. Why did you——

A. Dividends—no, I didn't know nothing about that. I asked her who paid the premiums on the policy and she said Harry was. "Well," I said, "that seems the only thing decent to do."

Q. Did she tell you at that time, 1947 or thereabouts, that Mr. Alker was paying her any dividends on any stock?

A. No.

By Mr. Hellman:

Q. Mrs. Bruce, where were you living at the time?

A. On Ontario Street.

Q. What was the address?

A. 2057 Ontario.

Q. East or west?

A. West.

Q. Where was Mrs. DuBan living?

A. In the apartment.

Q. What apartment?

A. 208——

Q. Do you know what apartment house, the name of the apartment house?

A. I know where it was—up there opposite the Drive—201 Cambridge.

Q. The Cambridge Apartments?

A. Yes.

Q. And what time of the day did you get there?

A. In the afternoon.

Q. Would you know about what time?

A. No.

Q. Was it in the winter?

A. No, in the summer. She mentioned the fact the only breeze she was getting was coming from the fire escape.

Q. Who else was in the apartment at that time?

A. Towards the end of the conversation the other old lady was bustling around.

Q. You mean Mrs. Dunwoody?

A. Yes.

Q. She was there at the time of your visit?

A. Not near me at all.

Q. But in the apartment?

A. Going back and forth.

Mr. Alker: Whom do you mean by Edgar was up there until the time she died?

The Witness: I said the old lady.

Mr. Alker: Mrs. Dunwoody isn't so old.

By Mr. Hellman:

Q. Do you know Mrs. Dunwoody?

A. I met her that day.

Q. You met her that day in the apartment?

A. When I got up to leave Mrs. Dunwoody came in the room and she introduced me to her and said she was living there.

Q. Mrs. Dunwoody introduced you?

A. Mrs. Dunwoody didn't introduce me to anybody. Mrs. DuBan introduced me to her.

Q. How did you get to the apartment house?

A. By taxicab.

Q. What is your age?

A. I am 70.

By Mr. Booth:

Q. Had Mrs. DuBan at any other time discussed any of her business affairs with you?

A. No.

Q. When did you discuss this matter with Mr. Alker?

A. When did I discuss it with him?

Q. Yes.

A. Well, my son-in-law asked me if I had ever talked——

Q. Who is your son-in-law?

A. Mr. Struckman.

Q. She had a conversation with you?

(Discussion off the record.)

A. Mr. Struckman.

By Mr. Hellman:

Q. When did you first discuss it with Mr. Alker?

A. I only discussed it once with Mr. Alker.

Q. When was it approximately—after Mrs. DuBan died?

A. Yes, after Mrs. DuBan died.

Q. How soon after she died, if you can tell me?

Mr. Alker: She doesn't know dates.

Mr. Booth: Do you mind if we ask?

By Mr. Booth:

Q. Approximately how long was it after Mrs. DuBan died?

A. I don't know. I can't tell you.

Q. Did you discuss it with him personally or over the telephone?

A. Over the telephone.

Q. And how long have you known Mr. Alker?

A. For years.

Q. He was a friend of your husband's?

A. He was—definitely was. He was such a friend that nobody in the darn family ever paid him anything for whatever he did.

Mr. Booth: Strike that out.

Mr. Alker: Leave it in.

By Mr. Booth:

Q. How do you know?

A. We never paid him. I know he did things for John Bruce and he was never paid for that.

Q. You never paid him anything?

A. We never got a bill.

Q. You don't know anything about the other members of the family, what they may or may not have paid him?

A. Yes, I do.

Q. How do you know?

A. Yes, I do. You can't live with a family twenty years and not know of your——

Q. I want to know whether you know of your own knowledge whether anybody else paid him any money?

A. Only what I heard. Uncle Al would just say, "Call Harry. Let Harry do it."

Q. That's what I thought.

A. That's what you thought. Well, that happens to be what really was going on.

By Mr. Hellman:

Q. How often did you see Mrs. DuBan?

A. Not very often. When you are raising five babies you don't have time to——

Q. Do I understand this was the last time you saw Mrs. DuBan before she died?

A. That is right.

Q. And you never saw her afterward until she was laid out.

A. That's right. We did talk a lot over the telephone.

Q. I understand Mr. DuBan was paying you $50 a month when he was alive.

A. That hasn't any bearing on this. Do I have to rehash that? He took my business——

Q. Were you receiving $25 a month from Mrs. DuBan while she was alive?

A. Yes. She didn't want anybody to know or all the rest of the family would expect the same. I almost said something else.

RE-DIRECT EXAMINATION.

By Mr. Alker:

Q. Mrs. Bruce, was it before or after you read the article in the paper of the suit of DuBan against——

A. It was before.

Mr. Booth: Objection.

By Mr. Alker:

Q. Was it after she died?

A. Definitely. Ernest and I had talked the estate over and were wondering what was going on. He said something about you. I can't tell you just what.

By Mr. Booth:

Q. As a result of your conversation with your son-in-law——

By Mr. Alker:

Q. Had Mr. DuBan been helping you with the children before Mrs. DuBan gave you $50 a month?

A. Mrs. DuBan didn't give me $50—it was $25.

Q. She helped the other relatives, didn't she?

A. Yes.

Q. When you had this conversation with her it was about the time she settled with Dr. Anders and Mr. Euhers.

A. Yes.

Mr. Booth: I move that is leading. The lady fixed it at 1947.

By Mr. Alker:

Q. You don't remember what year it was, but it was when those two things took place.

(Discussion off the record.)

By Mr. Alker:

Q. What relation was Dr. Anders to her; was he any blood relation?

A. No. He was just a good friend.

Q. Was he Mr. DuBan's doctor?

A. He got hell if Uncle Al got sick. He was not supposed to let him get sick.

Q. Was Mr. DuBan a cripple and more or less an invalid for many years?

A. He was crippled.

Q. He was a very strong-minded individual, wasn't he?

A. You're telling me. Everybody jumped this way, his brother included.

RE-CROSS-EXAMINATION.

By Mr. Booth:

Q. Well, now——

A. He cracked the whip.

Q. Was Dr. Anders the physician for Mrs. DuBan?

A. I think he was their family physician.

Q. For a long time?

A. For many, many years.

Q. He was her family physician, is that right?

A. Yes.

Mr. Alker: Was George Euhers, was he a friend of Mrs. DuBan's?

The Witness: Yes, and Mr. DuBan's. She settled with him for fifty cents on the dollar. There was nothing to be had from the doctor because he had gone into bankruptcy. I am only telling what she said to me.

By Mr. Booth:

Q. What somebody else told you.

A. That somebody happens to be Mrs. DuBan.

Q. Did Mrs. DuBan ever say to you that Harry Alker had brought suit against Dr. Anders?

A. No.

Q. That he had recovered a judgment against him?

A. No.

Q. And attached his interest in his father's estate?

A. I told you the conversation I had with Mrs. DuBan. That is it. Nobody else's judgment or anything else.

Mr. Alker: That she had settled with him and didn't want anything from him.

Mr. Booth: She doesn't know anything about it.

(Discussion off the record.)

By Mr. Booth:

Q. Well, when was your daughter married?

A. 1949.

Q. Would you say that you have another daughter that was married, too?

A. They are all married.

Q. When was your other daughters married?

Mr. Alker: Now, wait a minute.

(Discussion off the record.)

By Mr. Booth:

Q. How many daughters do you have?

A. Four.

Q. Can you tell us when the different ones were married?

A. I don't think I can. My husband—by God, I can remember that. Don't push me too hard. I am telling you the truth. He died in 1934 and I can remember that.

Q. The girls were all small?

A. They were all small.

Q. The DuBans had no children?

A. No.

Q. Therefore, they felt a certain responsibility to look after the girls.

A. I don't remember whether they did not not. Who the devil cared whether I had beans for the pot or not.

I have read the foregoing transcript of my testimony and I certify that it is true and correct.

ELVA BRUCE
Elva Bruce

TESTIMONY

Philadelphia, Pa., April 25, 1956

Before MacNeille, P. J.

Edwin Booth, Esq., counsel for plaintiffs.

John J. Gilbride, Jr., Esq., and
Isidore Baylson, Esq., counsel for defendant.

PLAINTIFFS' EVIDENCE

Mr. Booth: If your Honor please, I would like to offer in evidence paragraph one of the complaint which reads as follows: The plaintiffs are Girard Trust Corn Exchange Bank, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in a banking and trust business with offices in the City of Philadelphia, and Florence Fisher Dunwoody, who resides at 7426 Beverly Road, in the City of Philadelphia, executors under the will of Mamie DuBan, deceased. The corresponding paragraph of the answer says admitted.

Paragraph two of the complaint: The defendant, Harry J. Alker, is and has been for many years an attorney-at-law engaged in practice as such in the City of Philadelphia, presently maintaining his offices in the Land Title Building, southwest corner of Broad and Chestnut Streets in said city. Paragraph two of the answer says admitted.

Paragraph three: That the said Mamie DuBan died on November 8, 1953 at the age of eighty-six years, a resident of the City and County of Philadelphia, leaving a last will and testament dated May 18, 1951, and

codicils thereto, duly proved and admitted to probate by the Register of Wills of Philadelphia by whom letters testamentary were granted unto the plaintiffs on November 16, 1953. Paragraph three of the answer, admitted.

Paragraph four of the complaint: That the said Mamie DuBan was the widow of Alfred A. DuBan who died on November 12, 1938, a resident of the City and County of Philadelphia, leaving a last will and testament dated October 20, 1936, duly proved and admitted to probate by the Register of Wills of Philadelphia, by whom letters testamentary were granted thereon unto the said Mamie DuBan, the executrix therein named, on November 21, 1938. Paragraph four of the answer, admitted.

Paragraph five of the complaint: That the said Mamie DuBan was the sole legatee and beneficiary under the said last will and testament of the said Alfred A. DuBan, deceased. Paragraph five of the answer, admitted.

Paragraph six of the complaint: That the defendant had been a close and intimate friend of the said Alfred A. DuBan for many years prior to his decease, during which period he had also been his legal counsel, and in his capacity as attorney for said decedent during his lifetime and as attorney for his widow and executrix after his decease, the defendant owed to them the duty to act with the highest degree of fidelity and fairness and the utmost of good faith in all of his dealings and transactions with his said clients with reason of the relationship of trust and confidence existing between them. Paragraph six of the answer: Admitted that defendant was a close friend of Alfred A. DuBan and also a close friend and counsel of Mamie DuBan. As to the remaining facts alleged in paragraph six of the complaint they amount to conclusions and therefore need not be answered.

Paragraph eight of the complaint: That the defendant did not return any of the said stock to the said Alfred A. DuBan in his lifetime and in the settlement and distribution of the estate of said decedent there was transferred and assigned, inter alia, unto the said Mamie DuBan, the sole legatee and beneficiary under his will, the claim of the decedent against the defendant for said shares of stock. That the written assignment of said claim, a true and correct copy of which is hereto attached, made part hereof and marked Exhibit 5 was prepared by the defendant who was then acting as counsel for the said Mamie DuBan, individually and as executrix under the will of her late husband in all matters relating to the settlement of his estate.

Paragraph eight of the answer: Defendant admits that he did not return to Duban in Duban's lifetime any of the specific certificates referred to. DuBan did have in his possession or with his loans certificates for 775 shares which belonged to defendant, which DuBan applied on account of the 4400 shares.

Paragraph twelve of the complaint: That the market value of 1925 shares of common stock of the National Dairy Products Corporation on March 8, 1954 was $126,087.50 based upon the closing price of $65.50 per share on said date.

Paragraph twelve of the answer: Admitted.

I would like to offer in evidence as part of this the copy of the assignment referred to as having been prepared by Mr. Alker, and which is Exhibit No. 5 attached to the complaint.

Now, Mr. Gilbride, you have a letter of demand that we sent to you demanding the return of the stock. We ask you to produce it.

Mr. Gilbride: The demand was admitted.

Mr. Booth: You admit that demand was made for the return of this stock on March 20, 1954?

The Court: March 20 what year?

Mr. Booth: 1954. I just want to check that date, sir. It is March 8, 1954. Is that correct, that you will admit that demand was made for the return of the stock on March 8, 1954?

Mr. Gilbride: In what paragraph did you plead the demand?

Mr. Booth: Down at the end. Paragraph eleven.

Mr. Gilbride: The demand is admitted.

Mr. Booth: All right. And you also admit that demand was made for the payment of the dividend of December 10, 1953?

Mr. Gilbride: Whatever your letter—

Mr. Booth: Whatever is contained in this letter you will admit that demand—

Mr. Gilbride: That is correct.

Mr. Booth: I offer that in evidence.

The Court: What is the date of that letter?

Mr. Booth: It is dated February 24, 1954.

(Letter was marked for identification as Plaintiffs' Exhibit No. 1.)

LENA LOEVNER, sworn.

By Mr. Booth:

Q. Miss Loevner, are you employed at this time?
A. Yes.
Q. Where?
A. School district.
Q. Philadelphia?
A. Yes.
Q. In what capacity?
A. Secretary.

Q. Where do you live at this time?

A. 2032 Walnut Street. The same as I did—

Q. The same as what?

A. The same as I did for the last sixteen years.

Q. Did you know Mr. Alfred A. DuBan?

A. Yes.

Q. How did you come to know him?

A. I was his secretary. I saw an ad in the paper. I worked for him one year before he died.

Q. Who was his widow?

A. Mamie DuBan.

Q. Where did Mamie DuBan live at the time of her husband's death?

A. The Cambridge Apartments.

Q. Did she continue to live there until her death?

A. Yes.

Q. Do you know when she died?

A. November, 1953.

Q. What kind of work did you do for her?

A. Secretarial work, part-time.

Q. Do you know Mr. Harry J. Alker, Jr., the defendant in this case?

A. Yes.

Q. How long have you known him?

A. Since I came with Mr. DuBan.

Q. Did you ever see him write his name?

A. Yes.

Q. Many times or once or twice or frequently? How often? What would you say?

A. Well, many times, I guess.

Q. Do you think you would know his signature if you saw it?

A. Yes.

Q. Miss Loevner, I show you a letter dated October 10, 1930, on the stationery of some lawyers including Harry J. Alker, Jr., 1419 Land Title Building, and ask you to tell us who signed that letter.

A. It looks like his signature.

By the Court:

Q. Looks like whose signature?

A. Yes.

By Mr. Booth:

Q. Who do you mean?

A. Mr. Alker.

Mr. Booth: Does your Honor want this read into the record?

The Court: I think so.

By Mr. Booth:

Q. Suppose you read that to us.

A. This will acknowledge receipt by me from you of 200 shares of National Dairy Products Corporation common stock, which stock I am to have the right to use with the Integrity Trust Company as collateral for my loan and which stock I am to return to you upon demand if not sooner. I cannot tell you how much I appreciate your great kindness. Sincerely yours, Harry J. Alker, Jr.

Q. Now I show you a receipt dated October 15, 1930, and ask you whose signature that is?

A. Mr. Alker's.

Q. Will you read that receipt to us?

A. Received as loan October 15, 1930, of Alfred A. DuBan, certificates totaling 1200 shares of National Products Corporation common stock belonging to him, which I am to return to him on demand if not sooner.

Q. Now I show you a receipt dated November 24, 1930, and ask you whose signature is signed on that receipt?

A. Mr. Alker's.

Q. Will you read that to us?

A. Received November 24, 1930, of Alfred A. DuBan, certificates totaling 2000 shares of National Dairy Products Corporation common stock to be returned on demand or sooner. These certificates with the certificates already delivered for 1400 shares of National Dairy Products Corporation common stock constitute a loan to Harry J. Alker, Jr., making 3400 shares in all.

Q. Now I show you a receipt dated September 29, 1931, and ask you whose signature is signed on that receipt?

A. Mr. Alker's.

Q. Will you read that receipt to us?

A. Received this 29th day of September, 1931, from Alfred A. DuBan the following certificates of common stock of National Dairy Products Corporation as a loan to me, and to be used by me as collateral security for loans made to me by the Integrity Trust Company of Philadelphia, State of Pennsylvania.

Do you want the numbers and all?

Q. Yes.

A. C 61465, 100 shares; C 61466, 100 shares; C 61467, 100 shares; C 61468, 100 shares; C 61469, 100 shares; C 61470, 100 shares; C 61471, 100 shares; C 61472, 100 shares; C 61473, 100 shares; C 61474, 100 shares; 1000 shares.

This is to acknowledge also that I have 3400 shares of National Dairy Products Corporation common stock loaned me by Mr. DuBan and pledged some time ago.

Q. Now these four papers, can you tell us where they were at the time of Mrs. Duban's death?

A. Evidently in the box, because I had never seen them before this time.

Mr. Gilbride: I am going to object to the answer.

The Court: We will have to correct that.

By Mr. Booth:

Q. I say can you tell me where these were, these four papers, at the time of Mrs. DuBan's death?

A. I had never seen them before.

Q. You had never seen them before?

A. No. They must have come from the box.

Q. Did you find them?

A. No, I didn't find them. This is the first I have seen these things.

Q. And you don't know where they were found?

A. No.

Mr. Booth: All right. I will prove that later. I want to offer those four in evidence and we will mark them Plaintiff's Exhibits 2, 3, 4 and 5.

By Mr. Booth:

Q. Miss Loevner, I show you a letter dated March 23, 1946, addressed to a Miss Lena Loevner at 2032 Walnut Street. Is that you?

A. Yes.

Q. Will you tell us whether you received that letter from Mr. Alker about that date?

A. Yes.

Q. Is that his signature to the letter?

A. Yes.

Q. Will you read that to me and to the Court?

A. Dear Miss Loevner: Mrs. DuBan has practically cleaned up all of the matters in the estate. Unless she intends to keep the estate separate from her own affairs I would have her execute the enclosed so that they all become hers and hereafter all the things will appear in her own account. If anything should happen to her then it wouldn't be necessary to take out letters D.B.N. in Mr. DuBan's estate and would save a lot of expense. It might be well to see me about it before you talk to Mrs. DuBan. If Mrs. DuBan wants me to run up and see her about it, let me know. Very truly yours, H. J. Alker.

The Court: Have you had that marked?

Mr. Booth: That hasn't been marked.

(Letter was marked for identification as Plaintiff's Exhibit No. 6.)

By Mr. Booth:

Q. I show you a form of assignment on the backing of Harry J. Alker, Jr., and ask you if this is the paper that was enclosed in this letter to you of November 23, 1946?

A. March 23.

Q. March 23, 1946. Is that the paper?

A. Yes.

Mr. Gilbride: What is the question?

Mr. Booth: My question was is this the paper that was enclosed in this letter, this form of a transfer.

The Witness: Yes.

By Mr. Booth:

Q. That is the paper?

A. Yes.

Q. Is that the signature of Mrs. DuBan to the paper?

A. Yes.

Q. And Mrs. DuBan signed it and then what did you do with this paper? Do you remember?

A. I don't remember.

Mr. Booth: I offer that in evidence.

Mr. Gilbride: Now may I just raise a question there? Can I see that please?

By Mr. Gilbride:

Q. Miss Loevner, this letter marked number 6 makes no reference to any enclosure whatever, does it?

A. Let me see it.

Mr. Booth: It certainly does.

Mr. Gilbride: Where?

Mr. Booth: I would have her execute the enclosed.

Mr. Gilbride: That is the point I just wanted to make. That is all right.

Mr. Booth: Do you withdraw that?

Mr. Gilbride: Yes.

By Mr. Booth:

Q. Miss Loevner, I show you a letter dated December 24, 1942, addressed upon the stationery of Harry J. Alker to Mrs. Alfred DuBan and ask you if you can tell us who signed that letter?

A. Mr. Alker.

Q. Read it to us please.

A. Dear Mrs. DuBan: Enclosed find check for $880, being the dividend on the 4400 shares of stock, which I understand you did not received this week. Sincerely yours, Harry J. Alker.

Mr. Booth: I offer that in evidence.

By Mr. Booth:

Q. I show you a letter dated February 11, 1943, on the stationery of Harry J. Alker and ask you who signed that letter?

A. Mr. Alker.

Q. Will you read it?

A. Dear Miss Loevner.

Q. That is addressed to you?

A. Yes. At the Cambridge in care of Mrs. DuBan. Dear Miss Loevner: I have delivered to Mr. Heuer today 440 shares of National Dairy Products Corporation common for Mrs. DuBan. I wish you would look among your records and you will find an assignment by me of the 440 shares which were then held by Montgomery Scott Company and Lois executed an assign-

ment to Mr. D for their stock. Mr. DuBan got some of the stock while he was living and you have given credit for that in the stock return.

I hope to get release of stock at Montgomery Scott in Lois' name, as, Harry, her husband is now dead and I do not want her to be bothered about anything until we get settled. I will do what I can to get the balance of the stock to you at an early date.

I wish you would stop in with your record so that I can tell how many shares I own. I sort of left it to Mr. DuBan to keep the record and I hope to get it cleaned up in the next couple of months. I certainly appreciate Mr. DuBan's and Mrs. DuBan's goodness to me in this matter. They have both always been my real friends. Sincerely yours, H. J. Alker.

Mr. Booth: I offer that in evidence.

Mr. Gilbride: I forgot the date on that.

Mr. Booth: February 11, 1943.

By Mr. Booth:

Q. I show you a letter dated October 23, 1943, on the stationery of Harry J. Alker and ask you who signed that letter?

A. Mr. Alker.

Q. Will you read it to us?

A. Dear Mrs. DuBan: I enclose herewith the following certificates for National Dairy Products Corporation common stock in your name; 100 shares—certificate number C353346; 100 shares—certificate number C353347; 100 shares—certificate number C353348; 100 shares—certificate number C353349.

Note that Mr. Van Bomel is now signing and not Mr. McInerney.

It should not be long before I will be able to return all the stock. If I had not gotten sick I would have had it straightened out long ago. That gave me a complete setback.

Best wishes and hoping you are better, I remain, sincerely yours.

By the Court:

Q. That makes a total of how many shares in that letter?

A. Four hundred.

Mr. Booth: I offer that in evidence.

By Mr. Booth:

Q. I show you a letter dated November 26, 1943, on the stationery of Harry J. Alker, addressed to Miss Lena Loevner, and that is you?

A. Yes.

Q. Whose signature is on that letter?

A. Mr. Alker's.

Q. Will you read it to us?

A. Dear Miss Loevner: Let me know tomorrow, Saturday, over the telephone the number of shares of stock Anders owes and the dividends so that I may finish the statement of claim.

Of all the nerve to say that it was given to him. It was no more given to him than mine was given to me and mine was merely a loan which I will return. Sincerely yours, H. J. Alker.

Mr. Booth: I offer that in evidence.

By Mr. Booth:

Q. I show you a letter dated 9-11-44, addressed to Mrs. Duban. It is on the stationery of Harry J. Alker. And I ask you whose signature that is?

A. That is his handwriting.

Q. That is all in his handwriting?

A. Mr. Alker's.

Dear Mrs. DuBan: Could you have Miss Loevner stop in here so we may reconcile the number of shares? I hope to have them all back to you soon. Sincerely yours, Harry J. Alker.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated October 10, 1944, on the stationery of Harry J. Alker, and ask you who signed that letter?

A. Mr. Alker.

Q. Will you read that to us?

A. Dear Mrs. DuBan: The court decided against me on the first crack in re my loan. I am, however, making the next motion for a reconsideration. His decision is entirely different from his intention over the bench.

I wish Miss Loevner would get in touch with me and go over the figures with me as to the amount of stock I owe you as I want to see if I cannot clean it up in another way. I hate not having this paid.

I certainly wish the Mister were here to confer with. Very truly yours.

Mr. Booth: I offer that in evidence.

By Mr. Booth:

Q. I show you a letter dated December 21, 1944, addressed to Miss Lena Loevner, on the stationery of Harry J. Alker, and ask you whether you received that letter from Mr. Alker?

A. Yes.

Q. Is that his signature on the letter?

A. Yes.

Q. Will you read it to us please?

A. Dear Miss Loevner: I want to come to some arrangement before the end of the year about the DuBan National Dairy stock.

I have been calling you any number of times but don't seem to be able to get you. Can you arrange to stop here during the next week so that you and I know where we stand. George Heuer intimated that you did

not know how I arrived at the 1925 shares. Sincerely yours, H. J. Alker.

Q. And that is dated December 21, 1944?

A. Yes.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated 5-31-45, addressed to Mrs. Duban, on the stationery of Harry Alker, the defendant, and ask you who signed that letter?

A. Mr. Alker.

Q. Read it it to us please.

A. Dear Mrs. DuBan: I enclose check for $673.75 for dividend on the 1925 shares of National Dairy Products Corporation stock.

I am sorry I am a little late but money is slow coming in. Sincerely yours, H. J. Alker.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated September 10, 1945, addressed to Mrs. DuBan, on the stationery of Harry J. Alker, and ask you who signed that letter?

A. Well, it is per his secretary, per S. K.

Q. It is from his office?

A. From his office.

Q. Will you read that to us?

A. Dear Mrs. DuBan: Enclosed find check for $673.75, being a thirty-five cent a share dividend on the 1925 shares of National Dairy stock due today. Sincerely yours.

Q. I show you a letter dated May 24, 1946, addressed to Mrs. Alfred A. DuBan, on the stationery of Harry J. Alker, and ask you who signed that letter?

A. Mr. Alker.

Q. That is Mr. Alker's signature?

A. Yes.

Q. Will you read it?

A. Dear Mrs. DuBan: I enclose herewith for you to place in your box the assignment from you as executrix to you individually of the claims against Dr. Anders, Mr. Hewitt, Blanche Peters and myself. Will you place this among your papers?

Do you wish me to write Mr. Hewitt and Blanche Peters in reference to these claims?

I think there will be a decision by the Supreme Court of the United States in my case on Monday, or perhaps Monday a week. I am holding my breath hoping it will be favorable. I hope it will not be long now before I will be able to return that stock to you. I have certainly hated to keep you waiting so long.

I reported to Miss Loevner in re your income tax loss.

Hoping your eyes are much better, sincerely yours.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated December 11, 1946, on the stationery of Harry J. Alker, addressed to Mrs. Alfred A. DuBan, and ask you to tell us please who signed that letter.

A. Mr. Alker.

Q. Will you read it?

A. Dear Mrs. DuBan: Enclosed find check for $1,045, dividend on National Dairy.

I think this is a little more than it should be and will talk to Miss Loevner about it. Sincerely yours, Harry J. Alker.

By Mr. Booth:

Q. I show you a letter dated December 11, 1947, addressed to Miss Lena Loevner, on the stationery of Harry J. Alker, and ask you who signed that letter?

A. Mr. Alker.

Q. And that was received by you?

A. Yes.

Q. Will you read it to us please?

A. Dear Miss Loevner: Enclosed find check for $885, dividend on 1900 shares of stock.

I don't think this is the correct number, and I think it is a little less than that. I have been asking you to drop in so that we can go over it. Will you drop in at your first opportunity, as I would like the matter closed before Christmas. Very truly yours, H. J. Alker.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated March 11, 1948, on the stationery of Harry J. Alker, Jr., addressed to Mrs. Alfred A. DuBan, and ask you who signed that letter?

A. Mr. Alker.

Dear Mrs. DuBan: Enclosed find check for dividend in re National Dairy.

We have been swamped with income tax work, which explains the several days' delay. Sincerely yours.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated December 10, 1948, on the stationery of Harry J. Alker, Jr., addressed to Mrs. Alfred A. DuBan, and would you tell us please who signed that letter?

A. Mr. Alker.

Q. Will you read it to us?

A. Dear Mrs. DuBan: Enclosed find check for $855, being National Dairy dividend. I hope one of these days Miss Loevner will be able to come in and sit down and determine just how many shares of National Dairy are coming to you. Her record and my record just don't seem to gee and I want to see what the difference is.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated September 12, 1949, addressed to Mrs. Alfred A. DuBan, on the stationery of Harry J. Alker, Jr., and ask you who signed that letter?

A. Mr. Alker.

Q. Will you read it to us?

A. Dear Mrs. DuBan: Enclosed please find check for $962.50, dividend on 1925 shares of National Dairy stock. Could you have Miss Loevner here with her record of the number of shares involved? I would like to check with her my records.

I trust you are in good health. Lois has been seriously sick in bed at the Warwick for the last ten days. Sincerely yours.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated March 14, 1950, addressed to Mrs. Alfred A. DuBan and signed—it is on the stationery of Harry J. Alker—and I ask you whose signature is attached to that letter?

A. Mr. Alker's.

Q. Will you read it to us?

A. Dear Mrs. DuBan: Enclosed please find check for $1,155, being dividend on the 1925 shares.

With every good wish, Sincerely yours.

Mr. Booth: I offer that letter in evidence.

By Mr. Booth:

Q. I show you letter dated December 11, 1950, addressed to Mrs. Alfred A. DuBan, on the stationery of Harry J. Alker, and ask you if you can tell us who signed that letter?

A. Mr. Alker.

Dear Mrs. DuBan: Enclosed find check for

$1,732.50, being the dividend received today on the 1925 National Dairy stock. Sincerely yours.

Q. Now I show you a letter dated March 12, 1951, addressed to Mrs. Alfred A. DuBan, on the stationery of Harry J. Alker, Jr., and ask you who signed that letter?

A. Mr. Alker.

By the Court:

Q. What is the date of that letter?

A. March 12, 1951.

By Mr. Booth:

Q. Will you read that?

A. Dear Mrs. DuBan: Enclosed find check for $1,347.50, being the dividend on 1925 shares of National Dairy stock. Very truly yours.

Q. I show you a letter dated June 11, 1951, addressed to Mrs. Alfred A. DuBan, on the stationery of Harry J. Alker, and ask you who signed that letter?

A. Mr. Alker.

Q. Will you read it to us please?

A. Dear Mrs. DuBan: Enclosed find check for $1,347.50, being dividend on 1925 shares of National Dairy common. Sometime have Miss Loevner stop in in reference to the matter.

With every good wish, sincerely yours.

Mr. Booth: I offer you that letter in evidence.

By Mr. Booth:

Q. I show you a letter dated June 10, 1952, on the stationery of Harry J. Alker, addressed to Mrs. Alfred A. DuBan, and ask you whose signature that is?

A. Mr. Alker's.

Q. Will you read that to us please?

A. Dear Mrs. DuBan: Enclosed check for $1,443.75, being the dividend on the 1925 shares of stock.

Hoping you are not feeling this heat too much, sincerely yours.

Mr. Booth: I offer that letter in evidence, too.

I think that each time I offered these letters in evidence, but in case I did miss any I would like now to ask the Court to have them all admitted in evidence as part of the plaintiffs' case.

Mr. Gilbride: May I ask a question or two before I go into that question of agreeing to the admission?

By Mr. Gilbride:

Q. Miss Loevner, you were a secretary to Mr. and Mrs. DuBan for many years?

A. Yes.

Q. What were your duties to Mrs. DuBan?

Mr. Booth: Wait a minute.

Mr. Gilbride: Just a second. My point is that we contend this isn't a complete list of the payments.

The Court: Well, you can supply the rest of them in your case.

By Mr. Gilbride:

Q. Are there records of the moneys received from Mr. Alker by Mrs. DuBan?

A. Yes, sir.

Q. Do you have them?

A. I don't have anything.

Q. You don't have anything?

A. No.

Q. Where would they be?

A. Well, I guess with the lawyers or the Girard Trust.

Q. This is not the complete list of moneys received by Mrs. DuBan while you were in her employ?

A. Sometimes he sent a check without a letter.
Q. Sure.

Mr. Booth: Wait a minute.

Mr. Gilbride: I am going to object to these.

The Court: Wait a minute. You can offer any evidence you want to offer to show that what has been offered here is not correct. You can attack this evidence in your case with any evidence you have to offer. But you can't demand that they shall give you more things—

Mr. Gilbride: I just wanted to note on the record—.

The Court: He takes a risk in not giving you more if he has any.

Mr. Gilbride: I didn't hear you.

The Court: He takes the risk in his case in not giving you more if he has any.

Mr. Gilbride: That's right.

The Court: I suspect, however, that he will give you whatever he has.

Mr. Booth: I am willing to agree now with Mr. Gilbride, if he will go along with me on it, that Mr. Alker paid the dividends on all of the shares of stock that he had not returned—he paid to Mrs. DuBan sums equivalent to all the stocks that he had down to the death of her death.

Mr. Gilbride: Certainly.

Mr. Booth: Are you satisfied with that?

Mr. Gilbride: Certainly.

The Court: I am very glad that you gentlemen are getting to be very agreeable about it.

Mr. Booth: Mr. Gilbride, to save some more time perhaps you might be willing to agree that

at no time since Mrs. DuBan's death did Mr. Alker make return of any stock or any payments whatever to the executors of the Mamie Duban estate.

Mr. Gilbride: I don't know what that means. I can say this: That the pleadings admit 1925 shares as not being returned.

Mr. Booth: I am past that. I am asking you if you will admit that since Mrs. DuBan has died Mr. Alker has not paid any money or returned any stock to the executors of her estate.

Mr. Gilbride: That is admitted. The position is there was no legal obligation to do it.

Mr. Booth: It is admitted?

Mr. Gilbride: That nothing was paid to the estate of Mamie DuBan.

The Court: Nothing has been returned by Mr. Alker to her estate?

Mr. Gilbride: To her estate.

Mr. Booth: That's right. Do you have any cross examination, Mr. Gilbride, of this witness?

Mr. Gilbride: No questions.

BENJAMIN H. HELLMAN, sworn.

Mr. Booth: If the Court please, Mr. Hellman is one of counsel in this case, and I suppose that he would have to disqualify himself as counsel to testify here. There are only one or two short questions I want to ask him.

The Court: Well, suppose you ask your questions.

By Mr. Booth:

Q. Mr. Hellman, you heard the testimony of Miss Loevner about various letters?

A. Yes, I did.

Q. And you represent Mrs. Dunwoody, one of the executors of the Mamie DuBan estate?

A. I do.

Q. I ask you to look at these letters and referring to them by the dates or the exhibit numbers that are on there, will you tell me—

Mr. Gilbride: Wait. I am going to object to them.

By Mr. Booth:

Q. Will you tell me where they were found after the death of Mrs. DuBan?

Mr. Gilbride: I object to the witness testifying.

The Court: I beg your pardon?

Mr. Gilbride: I object to the witness testifying unless he removes the disqualification of being counsel and a witness at the same time.

Mr. Booth: Well, he says he will disqualify himself as counsel.

The Court: All right.

By the Court:

Q. Do you understand you are being disqualified as counsel?

A. Yes.

The Court: All right. He is disqualified as counsel then.

By Mr. Booth:

Q. Will you refer to those exhibits marked from Plaintiff's Exhibit 2 and run right on through and give us the numbers as you refer to them? When you testify just give us the numbers of the exhibits that you are going to tell us about.

A. P-2, P-3, P-4 and P-5 were found by me in the apartment of Mrs. DuBan shortly after her death.

Q. In her apartment?

A. In drawers. Scattered through drawers of the bureaus and chiffoniers and what not in her bedroom and elsewhere in her apartment.

Q. And her apartment was where?

A. In the Cambridge in Germantown.

Q. In Philadelphia?

A. Yes.

Q. Now will you look at these other papers?

A. I am now looking at P-7, the assignment. And that, too, was found among the effects of Mrs. DuBan in her apartment by me. I looked quite thoroughly through the effects there at the time shortly after her death and found this piece among other papers.

Q. Now will you look at these other papers that have been marked as exhibits and just look through them and tell us which ones of those you found and which ones you didn't find.

A. Referring to them in the order in which they are handed to me, Plaintiff's Exhibits number 6, number 7, number 8, number 9, number 10, number 11, number 12, number 13, number 14, number 15, number 17, number 18, number 19, number 20, number 21, number 22, number 23, number 24, number 25, number 26, number 27.

Q. They were found by you?

A. They were not found by me. They were given to me—or rather, I selected them from correspondence kept by Miss Loevner at the apartment and among a mass, of course, all of which I examined and culled those out.

Q. In other words, they were there in the apartment when you got there?

A. They were there when I got there shortly after the death of Mrs. DuBan.

(No cross examination.)

Mr. Booth: The plaintiffs rest, sir.

DEFENDANTS' EVIDENCE

ALFRED DuBAN BRUCE, sworn.

By Mr. Gilbride:

Q. What is your full name, Mr. Bruce?

A. Alfred DuBan Bruce.

Q. Where do you live?

A. 49 Brookline Boulevard, Havertown, Pennsylvania.

Q. What is your occupation or profession?

A. An attorney.

Q. How long have you been a practicing member of the Bar?

A. Approximately twenty years or over.

Q. Do you practice in Philadelphia?

A. I am a member of the Bar of Philadelphia although I practice mostly now in the last eight years in Delaware County.

Q. For many years you were associated in the office of Mr. Alker, weren't you?

A. That is correct.

Q. Did you know Mr. Alfred DuBan during his lifetime?

A. Very well. He was my uncle.

Q. Your uncle?

A. Yes.

By the Court:

Q. Who was your uncle?

A. Alfred A. DuBan was my uncle. My grandmother was married to DuBan and also to a Bruce. My uncle and my father were half brothers.

By Mr. Gilbride:

Q. Now then, you knew Mrs. Mamie DuBan?

A. Very well.

Q. As a matter of fact, you are one of the beneficiaries under the will of Mrs. Mamie DuBan; is that true?

A. That is correct. I received one hundred and twenty-one thousandths of the residuary estate. And my own immediate family of my wife and two children also are residuary legatees.

Q. Have you ever had any conversation with your aunt, Mrs. Mamie DuBan, with regard to her relationship or business transactions with Mr. Alker?

A. I did on one occasion.

Q. Set the time.

A. I would say it was approximately around 1947 or '48 in the fall of the year.

By the Court:

Q. Wait until I get this. This is a conversation in the fall of what year?

A. Approximately 1947 or '48. I can't recall just when it was. I know it was in the fall.

Mr. Booth: If the Court please, I think I should make an objection here. We served interrogatories and we asked for the names of the witnesses to this alleged oral conversation. And there were furnished the names of nine witnesses, but this gentleman's name is not among the nine.

Mr. Gilbride: Well, the only question is surprise then. We have the witness on the stand. It is my point that we are not confined to the answer to number three of the interrogatories, a list of witnesses who were given in answer to Mr. Booth's question in his interrogatories.

The Court: Is it attempted corroboration of what was said by the witnesses who are listed?

Mr. Gilbride: Certainly. It certainly is. There is no new element.

Mr. Booth: We asked this question in the interrogatories: State the identity and whereabouts of all witnesses to the alleged oral agreement between you and plaintiffs' decedent, Mamie DuBan, referred to in interrogatory number one, and the identity and whereabouts of all other persons having any knowledge or information concerning said alleged oral agreement.

The Court: Were you furnished a list of witnesses?

Mr. Booth: Yes. His answer to it is this—he says the only witness to the oral agreement was Harry J. Alker, Jr. That is his answer. And then he goes on and says the names and addresses of other persons having knowledge or information concerning the oral agreement are—and then he names nine people. It does not include Mr. Bruce.

Mr. Gilbride: I don't know of anything that limits us to the number of witnesses—

The Court: Well, you were required to answer their interrogatories. I don't have the interrogatories before me.

Mr. Gilbride: If your Honor please, at this point I move to admit into the record as evidence the interrogatories filed in this case and before your Honor, and the answers of the defendant.

Mr. Booth: I object to that.

Mr. Gilbride: I subpoenaed them from the prothonotary. The prothonotary was here this morning. And the understanding was that the whole record was now to be before Judge MacNeille. I offer the interrogatories and the answers filed in the instant case as part of this record:

The Court: Were you given an opportunity to cross examine them?

Mr. Booth: No. They were written interrogatories which we served on them and those are his answers.

The Court: Well, that was for information to help prepare the case.

Mr. Booth: Surely.

The Court: You can't rob him of the opportunity to face the witness and cross examine him.

Mr. Gilbride: Will you hear argument on that or will you wait?

The Court: You knew better than that. You knew very well that if you wanted to use them you had to give him an opportunity to cross examine.

Mr. Gilbride: He asked for written answers. Now my point in this case is this: That there was a complaint filed and then there was an answer filed setting up new matter. Then there was a reply filed by the plaintiff to that new matter. And the reply had already been filed many, many months. Then comes along a series—

The Court: There is only one thing to this. You are asking now to put evidence in by a witness that might or might not have been adverse to him, but he has had no chance to cross examine him.

Mr. Gilbride: He is going to have a chance now.

The Court: No, he doesn't have a chance now. Where are the witnesses?

Mr. Baylson: Right here in the court room.

The Court: Well, I think you would have a

chance to cross examine them. I think that would correct the situation.

Mr. Booth: If I knew the witnesses. But now they tack this gentleman on as an additional witness. I have not had any opportunity to find out much about him or anything about him. That is the purpose of this, to find out who these people are or are going to testify against me.

Mr. Gilbride: This man is under oath on the witness stand and Mr. Booth is going to have opportunity—

The Court: But he had no chance to prepare for his cross examination of this witness.

Mr. Gilbride: I am perfectly willing to take him off and let him go to the bottom of the case.

Mr. Booth: If your Honor please, in order to save any possibility here of error, because of the ingeniousness of this defendant, I am going to withdraw any objection and let him testify.

The Court: All right, sir.

By Mr. Gilbride:

Q. Now what was said and by whom was it said?

Mr. Booth: Wait a minute. Try to nail the time down a little better.

By Mr. Gilbride:

Q. Can you place it better?

A. I can't listen to both of you. Wait one second. What was your question?

Q. I am trying to place the time with more exactness. Can you place it with relationship to seasons of the year? First of all, what year was it, '47 or '48?

A. Well, as I recall, it was in the fall of the year.

By the Court:

Q. What year?

A. Now that is the question. I am not sure.

Q. You are not sure about that?

A. I am not sure of the year. I only visited my aunt about three or four times after my uncle died.

By Mr. Gilbride:

Q. Where did this conversation take place?

A. I had talked to her, I might say, over the 'phone several times.

By the Court:

Q. This was a 'phone conversation that you are talking about?

A. No. This was a personal conversation in her apartment in the Cambridge Apartments.

Q. Well, the 'phone then has nothing to do with what you want to testify to?

A. No. I would say I figure it might be '47 rather than '48.

By Mr. Gilbride:

Q. Was anybody else present?

A. I believe Mrs. Dunwoody, her sister, was there. I am sure she was.

By the Court:

Q. What made you say you just believed?

A. Well, I have to recall this. This is going back, and there are a lot of things that have happened to me in the last five or six years.

Q. Then are you sure or are you not sure?

A. I am sure of the conversation.

Q. You are sure there was a conversation?

A. Yes, absolutely.

Q. But are you also sure of the details of that conversation?

A. Yes, sir, very much so.

Q. Well, I am surprised then that you expressed any doubt about it. All right, go ahead with it.

By Mr. Gilbride:

Q. Now you say that to the best of your recollection Mrs. Dunwoody was present?

A. That is correct.

Q. What was said and by whom?

A. I brought up the subject of the loans of George Heuer and Harry J. Alker.

By the Court:

Q. What did you say? We have got to get what was said by each of you.

A. I will, sir. I said to my aunt, It seems to me, Aunt Mamie, that these men are men of affluence and seem to be rather well-to-do and I can't see why they couldn't repay their loans to you if they only paid it so much per month.

And her reply to that was, Alfred, your uncle thought the world of those boys and he wouldn't want them hurt in any way. And I don't intend to hurt them.

Now that is all that was said. I dropped the subject then. I dropped the subject after that. My aunt had said that and I didn't feel it incumbent upon me to go further with it.

By Mr. Gilbride:

Q. What was your relationship with Mr. Alker at that time?

A. I was working for him as an assistant.

Q. And you brought this question up to your aunt?

A. I did, yes, because I had had several run-ins with Mr. Alker and was rather angry at the time.

Q. You realize that Mr. Alker has filed a counterclaim in this case for $25,000?

A. I have been informed of that.

Q. Now, Mr. Bruce, you mentioned the fact that you were associated or connected with Mr. Alker's office in a professional capacity. From what years?

A. I went there as a law student from around the fall of 1932, when I was still a law student, and continued working for him until August of 1941, at which time I left him and went with the firm of Buckman and Buckman. I only stayed there until February 14, 1942, when I was commissioned in the United States Coast Guard and was in that service. And I finally went back to Mr. Alker in 1943, late 1943 in the fall. And I stayed with Mr. Alker then until 1948, August of 1948, when I went in business for myself in Delaware County.

Q. During the years that you were in Mr. Alker's office did you have opportunity to observe the relationship of attorney and client that existed between Alker and your uncle and your aunt?

Mr. Booth: I object to that.

The Court: I don't get your question.

By Mr. Gilbride:

Q. Can you of your own knowledge tell us what services were rendered by Mr. Alker to your uncle and to your aunt during the time you were in Mr. Alker's office?

Mr. Booth: I object to that.

The Court: Why don't we confine ourselves to the issue in this case?

Mr. Gilbride: Then I will recall him in the proper order.

The Court: I am not concerned very much with the lifetime relations between this couple, only in so far as it relates to anything relative to the business at hand.

Mr. Gilbride: I will call him at a subsequent time then on the question of the counterclaim.

The Court: You may call him as your witness, yes.

CROSS-EXAMINATION.

By Mr. Booth.

Q. You were only at Mrs. DuBan's three times since your uncle died in 1938; is that right?

A. I believe so.

Q. At this time when you went there did you go there because Mr. Alker sent you?

A. No.

Q. Did you go there because you were angry with Mr. Alker?

A. No. Do you want me to relate the circumstances?

Q. I am asking you to answer my questions.

A. All right. I will answer your questions.

Mr. Booth: That is all I want to know.

Mr. Gilbride: If your Honor please, if the case develops to the point where I am going to produce evidence in support of the counterclaim, I would like to recall Mr. Bruce at that time. That would be a question of proving services by Mr. Alker to Mr. DuBan and to Mrs. Duban and their estates.

The Court: Well, go ahead with your case.

HORACE S. RHOADS, sworn.

By Mr. Gilbride:

Q. Where do you live, Mr. Rhoads?

A. I live at 5008 Erringer Place, Philadelphia.

Q. What is your employment?

A. I am an accountant.

Q. With whom?

A. At the present time I am working on estates for Harry J. Alker.

Q. How long have you been working for Mr. Alker?

A. Since 1938.

Q. Did you know Mamie DuBan during her lifetime?

A. I did.

Q. Did you know Alfred DuBan during his lifetime?

A. I worked with Mr. Alfred DuBan prior to his death.

Q. Under what circumstances?

A. In the consolidation of the milk mergers of Supplee, National Dairy, Hauptfuher—

Mr. Booth: I object to this. Talking about what work he did for Mr. DuBan is certainly irrelevant at this time in this case. Alfred DuBan has been dead since 1938.

The Court: What is the purpose of this?

Mr. Gilbride: I will stop at this point. Shall I confine these witnesses to their conversations, the evidence, on the release and bring them back later on the question of the counterclaim?

The Court: Well, have you got a release, an executed release?

Mr. Gilbride: We have an oral release.

The Court: Well, is that what you want to do, prove by these witnesses who were all present at the time the oral release was given—

Mr. Gilbride: No. I am going to prove by these series of witnesses conversations with Mrs. DuBan during her lifetime on the subject of the liability of Mr. Alker for the return of this stock.

The Court: Well, I think he has a right to do that.

Mr. Booth: I think so.

The Court: But be sure in each instance that you show whether or not they have any interest in the matter.

Mr. Gilbride: Well, I will bring that out.

The Court: If they have any interest in the outcome of the case, the jury ought to know it.

By Mr. Gilbride:

Q. Do you have any interest of any nature or kind in the outcome of this proceeding?

A. No, sir.

Q. Are you interested in the estate of Mamie DuBan?

A. No, sir, I am not.

By the Court:

Q. You have been working for Mr. Alker for how long?

A. Since 1938.

Q. Is that your only job?

A. No. I am an accountant. I work for different people. I work for George Heuer.

Q. Never mind about the others. But you are called in by Mr. Alker how frequently?

A. Well, maybe twenty-five per cent of my time or fifteen per cent of my time. Sometimes it is all of my time.

Q. Well, can you be any more definite than that so that I can have some idea?

A. I would say twenty-five per cent would be the average.

By Mr. Gilbride:

Q. Did you ever have any conversation with Mrs. DuBan with regard to her relationship with Mr. Alker?

A. Yes, sir.

Q. Was there more than one conversation?

A. It was at least five or six.

Q. When was the first one?

A. The first one was in 1948.

Q. Where?

A. At her apartment.

Q. Who was present?

A. Nobody but Mrs. DuBan and myself.

Q. Under what circumstances were you up there in the apartment?

A. I was there with some papers to be signed in Harry J. Alker and Mamie DuBan versus the FDIC.

Q. What is that?

A. That is the Federal Deposit Insurance Company.

Q. How did the conversation with Mrs. Duban come about?

A. Mrs. DuBan said she didn't see why she was being asked to sign these papers continuously, as she had settled with Mr. Alker and she was no longer interested in the case.

Q. Was there anything further said on that occasion?

A. She told me the basis of the settlement.

Q. What did she say?

A. She said that Mr. Alker had agreed to pay her the dividends on the 1925 shares of stock for as long as she lived. She in turn had released any collateral she had belonging to Mr. Alker. She had released any right she had to the stock of 1925 shares.

Q. What?

A. The 1925 shares of stock. And that she would—and she would—and any doubts that might occur in the course of the open accounts. He in turn would agree to release any debts he had against Mr. DuBan or Mrs. DuBan or the DuBan family.

By the Court:

Q. Can you remember what she said to you and what you said to her so that we can get this down instead of just getting your conclusion as to what it was?

A. What she said to me was that she had cleaned the matter up. She knew that I knew Mr. Heuer and I had done work for him.

Q. I am trying to get what the words of the conversation were.

A. The words said by her was that she had released any collateral that Mr. Alker had—that she had belonging to Mr. Alker.

Q. Yes?

A. She had released the payment of any stock owed by Mr. Alker.

Q. Yes?

A. And that he in turn—and she had released any debits to the account. See, there was debits to the account for the selling of different—

Q. Yes?

A. He in turn had agreed to pay—

Q. She told you this?

A. She told me this.

Q. Clearly that day?

A. That was that day, yes. She had talked quite a little.

Q. You only remember the essential parts then? You are not giving me the whole conversation?

A. Well—

Q. Only what you regard—

A. Well, this was the question of the conversation. The personal part of the conversation I don't think it is necessary to relate here.

Q. You had better let us judge that.

A. Of course, the personal part of the conversa-

tion, if the Judge wants to hear it, it was with regard to the health of Mr. Alker and—

By Mr. Gilbride:

Q. What did she say? That is what the Court is trying to get at. What did this woman say?

A. She wanted to know how Mr. Alker was from a health standpoint; how he was doing.

By the Court:

Q. Well, what did you tell her? If we are going into it, let's do it right.

A. At that time I told her that his health was very much better now and that he had a good doctor and I thought he would come around all right.

Q. All right. Now we are through with that part. Now did you get down to business then?

A. Then she told me that he had agreed to pay her this dividend as long as she lived.

Q. That came about as a result of a discussion about his health?

A. No. That came—the health was the latter discussion. The discussion was first she wanted to get off her chest this agreement.

Q. She didn't tell you she had anything in writing or anything like that?

A. No.

Q. You are an accountant?

A. Yes.

Q. Did you ask her if she had anything in writing?

A. I didn't ask her then. I asked Mr. Alker did he have anything in writing when I saw Mr. Alker when I came back.

Q. But you didn't ask her?

A. I didn't ask her.

Q. You are an accountant?

A. Yes.

By Mr. Gilbride:

Q. When was the second time? You said there were four or five times you had conversations with Mrs. DuBan.

A. It covered—see, there were so many certioraris in this Federal Deposit Insurance case, and in each case she would have to sign it. And it covered a period of about four or five years.

Q. What four or five years?

A. From '48 until '53.

Q. Now can you tell us the year of the second conversation, the second time you went to the apartment?

A. Well, the second time I went to the apartment was maybe eight months after the first time.

Q. And you place that in the fall of '47 or '48?

A. Yes.

Q. Now you are into about the summer or the late spring of '49. What was said at that time and by whom?

A. The same story was given to me almost every time I went there.

Q. Well, you heard this story then on more than one occasion?

A. I heard this story that I know of on five occasions.

Q. Then tell us exactly what she said.

A. She said that she had settled with Mr. Alker. She had settled with Mr. Heuer. And she had settled with doctor whatever his name is.

Q. Anders?

A. Anders. And that she thought she had her affairs now straightened out. And she told me about her agreement with Mr. Heuer which I already knew of. I knew—I also knew—she told me of Mr. Anders' settlement. And then she started on Mr. Alker's settlement.

By the Court:

Q. She did that every time you came to see her?

A. She didn't cover Dr. Anders every time I came to see her.

Q. Well, did she keep covering—

A. She covered the same ground every time I came.

By Mr. Gilbride:

Q. What did she say with regard to the Alker settlement?

A. She said—the only thing now as far as Mr. Alker, the only obligation of Mr. Alker was to pay her the dividend on 1925 shares as long as she lived, and that he would not put any bill in for debts against her or her husband's estate or other estates he had settled for her.

By the Court:

Q. How old a woman was she?

A. She was about at that time—she was about—she was very close to eighty.

By Mr. Gilbride:

Q. Did she converse or mention to you the security in the insurance policy and the stock she had?

A. Yes. I asked her when she was going to return them. She said, Just as soon as I can get to my box I will see Mr. Alker gets them back.

Q. Now is that the same conversation that she repeated the third time you went to the apartment?

A. The third time I went to the apartment was in reference to income taxes.

Q. When?

A. That was in March, 1949. She was having trouble with one of her income taxes as a result of the Heuer settlement.

Q. Was there anybody present there besides you and Mrs. DuBan?

A. At no time was anybody present in the apartment that I saw when I talked to her.

Q. When was the last time that you went to her apartment and had a conversation with her?

A. I went to her in late '52.

Q. Was anybody present at that time?

A. There was nobody there at that time.

Q. What did she say on that occasion? How did it come about?

A. Well, what she particularly said was how blind she was getting. That was the emphasis of her statement. How she couldn't see. And she asked me that I would hold her hand so she could sign the statements. And she went on to relate again the basis of this agreement.

By the Court:

Q. Each time she told you the same thing?

A. Yes. Just repeated the same story.

Q. Without you asking her any questions?

A. I didn't have to.

By Mr. Gilbride:

Q. Well, you speak about the fact that you went up there about this FDIC case, this Federal Deposit case.

A. Yes.

Q. Was she a party to that suit?

Mr. Booth: I object to that.

The Witness: She was.

Mr. Booth: I object to that and move that it be stricken out.

The Court: Wait until I get this.

Mr. Gilbride: I want to show why he was up there with these papers to be executed by her.

The Court: I can't hear you. You will have to say it again.

Mr. Gilbride: The purpose of that question is to show why he was up there. Mr. Rhoads was up at the apartment of Mrs. DuBan with papers in the FDIC case to be executed by Mrs. DuBan because she was a party defendant in it.

The Court: I don't see what that has got to do with this case.

By Mr. Gilbride:

Q. Well, then you had certain papers that Mrs. DuBan was to execute?

The Court: I understood he was there each time for the purpose of either the defendant's business or the woman's business which took him there. I understand that.

By Mr. Gilbride:

Q. Well, you say that she mentioned that any charges or bills that Mr. Alker had against her husband or her husband's estate and her or her estate were all to be cancelled?

Mr. Booth: Don't lead him too much.

Mr. Gilbride: I say he did testify to that.

The Witness: That is correct. That all bills were to be wiped out on both sides.

By the Court:

Q. Wait a minute. Let us get the words that constituted that. Were you present when the deal was made?

A. When what deal was made?

Q. In which each side agreed with the other that all bills should be wiped out.

A. I was not.

Q. You were not?

A. I was not present.

Q. Then you only know this by hearsay?

A. I only know what she told me.

Q. Well, tell us what the conversation was.

A. The conversation was—

Q. What did you say to her and what did she say to you?

A. The conversation was—I said to her, I will have to get you to sign these papers in the FDIC case.

She said, I don't know why I have to keep signing these papers because I have entirely settled the whole thing with Mr. Alker.

Q. Did she give you any of the details of that settlement?

A. Then she went on to enumerate what the details was.

Q. Tell us how she enumerated them.

A. She enumerated by saying that she had cleared the slate in this way; that she had agreed or Mr. Alker had agreed that she would get the dividends. That was primarily in her mind. That she would get the dividends as long as she lived on this 1925 shares.

Q. Yes.

A. He would not present a bill against her estate for any work he had done for her or her husband or his or her relations.

Q. Did you make a note of that at that time?

A. Yes.

Q. Because you have a very good memory.

A. Yes. I reported the matter back to Mr. Alker and I referred to that before.

Q. Each time you went out, you got that same story and you came back and reported it to Mr. Alker?

A. Yes, I reported to Mr. Alker?

Q. How many times did you do that?

A. At least five times.

Q. What made you stop it?

A. Well, I only went there when I had a paper to sign. I didn't go there for a social call.

Q. Every time you went there then was five times?

A. Six times I think I went there.

Q. Did she talk to you on the sixth time?

A. On the sixth time, which was in the middle—she was busy and I believe it was very bad weather and I was up there late at night and she didn't talk that time.

Q. She didn't talk that time?

A. No.

Q. How old was she?

A. She was eighty-some years old.

By Mr. Gilbride:

Q. Do you know if Mr. Alker ever rendered a bill against Mrs. DuBan?

Mr. Booth: I object to that.

The Witness: I am not in a position to answer that question.

Cross-Examination.

By Mr. Booth:

Q. Mr. Rhoads, when you were first to Mrs. DuBan's house in 1948 sometime—

A. I was at Mrs. DuBan's house long before 1948.

Q. Well, when the last conversation took place, the first time was 1948, right?

A. The first time that I had papers to sign and she began to discuss this settlement was in 1948.

Q. That was in 1948?

A. Yes.

Q. And she was then a woman in her eighties; is that true?

A. I would say—I didn't ask her her age but I would say she was.

Q. Well, you have heard it stated here that she died in November of '53 at the age of eighty-six.

A. Well—

Q. So then she must have been eighty-two about when you first went there in '48.

A. That's right.

Q. And the last time you were there she was eighty-five.

A. She was a very old woman.

Q. And what was her physical condition?

A. Her physical condition as being able to get around was very good except for her eyesight. Her eyesight was very poor.

Q. Well, would that same condition get better or was she worse in 1952 when you last saw her?

A. The thing got worse between '48 and '52.

Q. So that when in 1952 you went there she was in pretty bad shape and practically confined to a chair, wasn't she?

A. No. She walked with help from the living room into the dining room table to sign the papers.

Q. And you say that at no time on these five or six occasions you were there that there was no one present in the room with this old lady when you went there?

A. There was nobody there, no.

Q. Nobody there?

A. No.

Q. Did you ever discuss any business matters with her outside of this matter with Mr. Alker? Did she consult you about anything?

A. Not after Mr. DuBan's death.

Q. Never did?

A. Not after Mr. DuBan's death.

Q. So you weren't in her confidence, were you?

A. No.

Q. On each of these five or six occasions she spon-

taneously blurted out the question about the settlement with Mr. Alker?

A. Yes. That would seem to be on her mind.

Q. Did you say to her at that time that if that is your understanding why don't you put it in writing?

A. I didn't say that to her. I told Mr. Alker that.

Q. Was anything done about putting it in writing so far as you know?

A. I don't know.

Q. You don't know that. Well, you are an accountant and you have had some experience working in Mr. Alker's office all these years.

A. That's right. I notified Mr. Alker of the conversation.

Mr. Gilbride: He is cutting off the witness, if your Honor please. What was your answer.

The Witness: I notified Mr. Alker, who I represented there, of the conversation in each case.

By Mr. Booth:

Q. Well, I say you were an accountant. You had worked in Mr. Alker's office a long time?

A. Yes.

Q. You understand that an agreement of that kind should have been put in writing. It should have been put in writing.

Mr. Gilbride: He is arguing with the witness.

Mr. Booth: I am not arguing with him.

The Court: He has a right to ask him if he was not astonished that a woman put that confidence in him, a mere accountant, when it would need a lawyer's answer. I think that has a right to be explored.

The Witness: Well, the fact was I knew Mrs. DuBan from the consolidation of the milk companies.

By Mr. Booth:

Q. I grant you all that. But I am getting down to the time since 1948 until '52 when you said you had these conversations with this elderly woman and that each time spontaneously she blurted this out to you about some alleged oral agreement with Mr. Alker.

A. Yes.

Q. And she didn't need any urging from you; she just blurted it right out?

A. That's right. Because she thought she shouldn't have to be a party to this suit.

By The Court:

Q. To what?

A. To this suit against the FDIC, or the FDIC suit.

By Mr. Booth:

Q. Which was a suit against Mr. Alker, wasn't it?

A. That's right, and her as well.

Q. How do you know that?

A. Because I know that she was a party to it. I took the papers up there.

Q. How do you know she was a party to it?

A. She was a party to this suit.

Q. Do you know Mrs. Dunwoody?

A. I have met Mrs. Dunwoody.

Q. Did you ever meet her there when you were at the apartment?

A. I don't remember ever seeing Mrs. Dunwoody there. I think maybe I can explain--see, I live in Germantown and I always went there before nine o'clock in the morning before I came in to the office. And therefore I rarely saw anybody but Mrs. DuBan.

Q. Would Mrs. DuBan at her age be up at nine o'clock in the morning?

A. She was up promptly before nine o'clock every morning I went there.

Q. Did she know you were coming?

A. Yes.

By The Court:

Q. Did she live there alone?

A. I don't really know.

Q. Did you ever see anybody else there but her?

A. I never saw anybody while I went there to get those papers.

Q. But you always went there early in the morning?

A. Yes.

By Mr. Booth:

Q. Mr. Rhoads, don't you know, as a matter of fact, that Mrs. Dunwoody, Mrs. DuBan's sister, lived with her for the last ten or twelve years in that same apartment?

A. I didn't know it, no.

Q. You don't know that and you were visiting there and pretending to know something about her family? You never saw Mrs. Dunwoody there?

A. I never saw Mrs. Dunwoody there.

Q. And all you were doing was running up there to get papers signed?

A. That is correct.

Q. For Mr. Alker?

A. That is correct.

Q. That was your sole purpose. And you are still employed by Mr. Alker, aren't you?

A. That's right.

Q. Mr. Rhoads, when you went to the apartment who left you in the front door?

A. Mrs.—the door was always ajar when I went there and I opened the door.

Q. You mean the door was open?

A. Always on ajar, yes.

Q. At nine o'clock in the morning?
A. Yes.

By The Court:

Q. Where is this?
A. I would 'phone her from my house that I was coming before I came.

By Mr. Booth:

Q. Well, I just understood you to say a minute ago you had no definite appointment with her.
A. I said I did have an appointment. I 'phoned her in every case before I went there.
Q. And you would go there at nine o'clock in the morning and the door would be open and you would walk in?
A. The door would be ajar.
Q. And the only persons there were you and Mrs. DuBan?
A. She was the only person I saw there. I don't know if anybody else was in the apartment. I only went as far as the living room and the dining room table.
Q. Did the maid ever let you in?
A. No.
Q. The cook?
A. No.
Q. Mrs. Dunwoody?
A. I don't remember ever seeing Mrs. Dunwoody there when I was there.

By The Court:

Q. But you are clear that you never saw anybody else there but Mrs. DuBan?
A. Mrs. DuBan who I wanted to see.
Q. Yes. That is all you ever saw?
A. That is all I ever saw there.

RE-DIRECT EXAMINATION.

By Mr. Gilbride:

Q. How well did you know Mrs. DuBan?

A. I had known Mrs. DuBan since about 1918. While I at no time was in her confidence or anything like that, I knew her as Mrs. DuBan, as Al DuBan's wife. And we had been to social affairs together in the dairy business and everything like that.

Q. Had you frequently seen her and talked to her during all those years from 1918?

A. Yes.

Q. So that she knew you very well?

A. She knew me; yes.

RE-CROSS-EXAMINATION.

By Mr. Booth:

Q. You frequently saw her where?

A. Well, during the early years I saw her at different functions.

Q. I am not going back to the year one.

A. How far do you want to go back?

Q. Let us go back since 1938. How frequently did you see her since 1938 and where?

A. Since 1938—I can recall I saw her in 1944 particularly.

Q. That is six years later?

A. Yes.

Q. Where?

A. I can't recall the dates back there that I saw her, but from time to time I would see her.

Q. Well, where did you see her?

A. I saw her at her apartment.

Q. I thought you said you went out socially with them?

A. I say that was earlier in the period when the milk consolidations were all in effect.

Q. Now you have got one visit since 1938?

A. That is a long period from 1918 to 1938.

Q. When was the next time you saw her?

A. What is that?

Q. When was the next time you saw her?

A. Well, I can't recall the dates that I saw her all the way back that period. It is too far back.

Q. You cannot give me the dates that you saw her on these last five times that you have testified to, can you?

A. I can tell you approximately the dates. And I can get the dates that I saw her.

Q. Well, you don't have them with you?

A. I don't have them with me right now, but I can give you the dates because I know when the papers were signed and filed.

Q. Would that help you to fix the time that you were there?

A. Yes.

Q. The papers might not have been filed that day or the day after.

A. Well, I don't want you to hold me to twenty-four hours.

Mr. Booth: All right, I am through with him.

The Court: We will take a recess now until quarter past one.

Mr. Gilbride: If your Honor please, I just want to make one comment here. These witnesses here are not only here for the testimony as to conversations with the deceased, Mamie DuBan, but it will also go to sustain the proof on the counterclaim. Now you say to keep the issues separate, and I will bring them back at a later time.

The Court: I am not saying anything about it.

I am here to try a case and I am now taking a recess and I will come back and go on and try the case.

(Court recessed from 12.15 p.m. until 1.15 p.m. at which time it resumed.)

Mr. Gilbride: If your Honor please, I offer into evidence the deposition of one Elva Bruce, an infirm witness, taken on behalf of the defendant in Roslyn, Pennsylvania, on Tuesday, September 13, 1955, at which time Mr. Booth was present and the witness was cross examined. Now the original of that is in the record before your Honor. May that be introduced into evidence?

Mr. Booth: Of course, if your Honor please, the admission of these is subject to the objections that were made at the time.

The Court: I would assume that.

Mr. Booth: Some of the questions, I think, were irrelevant. They were taken over my objection.

The Court: If you want to offer them in evidence they had better be read now so they can be subject to whatever rulings are required.

Mr. Baylson: May I read them, your Honor?

The Court: Yes. Read them on behalf of the defendant.

Mr. Baylson: Deposition of Elva Bruce, an infirm witness, taken on behalf of the defendant, at Roslyn, Pennsylvania, on Tuesday, September 13, 1955 at two o'clock p.m.

Present: Edwin Booth, Esquire, and Benjamin H. Hellman, Esquire, for the plaintiff; Harry J. Alker, Esquire, for the defendant.

Taking of the oath was waived at the time of the deposition with the understanding that the witness would sign and certify to the transcript.

ELVA BRUCE, testified as follows:

Direct Examination by Mr. Alker:

Q. What relation were you to Mrs. DuBan?

A. A sister-in-law.

Q. Did she ever discuss with you any of her affairs?

A. Well, yes.

Q. When and of what nature?

A. Well, this is quite a story—let's chop it in half. I am going to tell you this as it happened—as two old ladies would discuss something. I went to see her about something. Is it necessary to tell what it was?

Q. Go ahead.

A. When we got done the talk—what I had asked her, we were sitting there just gossiping and I noticed she had a davenport. It was a pretty red one—not a regular davenport, just more like a love seat. For want of something to say—I noticed a tear in it about so long and I said, "Oh, Mame, an upholsterer could do a wonderful job with that."

She said, "I can't afford to have anything like that done."

I said, "For heaven's sake, why don't you go out to the guys that owe you money? What's the matter with Dr. Anders?"

She said, "Well, he's gone in bankruptcy and the lawyer has settled fifty cents on the dollar."

I said, "What's the matter with Harry Alker, why don't you go after him?"

And she said, "Harry, oh, no. We have been friends for too many years. I could not do anything like that to him. I am cancelling his debt." And then later

on, as I went to leave, why, she said, "You know, I still hold his insurance policy, but I am going to return it to him."

"Well," I said, "who pays the premiums?"

She said, "Why, he does."

I said, "As long as you feel the way you do, that's about the only decent thing to do."

She left me under the impression she didn't have very much money. Uncle Al hadn't left her very much.

Mr. Booth: Didn't I object to that?

Mr. Baylson: No.

The Court: It doesn't show here.

Mr. Booth: I think I may have moved to strike it out.

Mr. Baylson: Maybe you do later on.

Q. Did she cancel the claim?

A. Yes, she cancelled the claim of Mr. Alker. She wouldn't—sell the stock. She couldn't afford to have the furniture repaired, yet when I was leaving she went into her bedroom and came back with her handbag. She had a roll—well, it was a roll with a rubber band around it. She handed me a dollar and said, "This is your cab fare."

I said, "Will you call a cab?"

"No," she said, "you can flag them downstairs."

We walked down the corridor and got on the elevator and she got in with me. Now, that was the extent of our conversation that day, and the only conversation I had with her.

(Discussion off the record:)

Mr. Booth: Now, go ahead Mr. Alker.

By Mr. Alker:

Q. Did she ever discuss the details of dividends or anything like that?

A. No, nothing.

Q. Nothing?

Mr. Booth: Was that the whole conversation?

The Witness: About money that is.

By Mr. Alker:

Q. Were there any subsequent words about it or me?

A. No.

Mr. Alker: Cross examine.

Cross examination by Mr. Booth:

Q. Mrs. Bruce, when was this conversation?

A. If you want the day or the date, I can't give it to you.

Q. Approximately what year was it?

A. I should judge about—about 1947. I was living—

Q. 1947?

A. Yes.

Mr. Alker: She is not sure of that.

By Mr. Booth:

Q. I am asking you to fix it as definitely as you can, the year this conversation was had.

A. I think it was 1947.

Mr. Alker: Now, wait a minute. She said—

A. I said it was 1947.

By Mr. Booth:

Q. To the best of your recollection.

A. It could have been 1948.

Q. It is important you fix the date as near as you can fix it. Is it 1947?

A. I think so, yes. Am I going to be hung if it is 1948?

Q. Nobody is going to hang you.

A. Well, I want to know—

Mr. Booth: Now, the witness has already fixed the date as 1947. You can question on redirect.

By Mr. Booth:

Q. Now, what was the debt of Mr. Alker's that you were talking about?

A. What was the debt?

Q. Yes.

A. Well, all I knew, being a member of the family, those two men both owed Uncle Al money and he owed them money.

Q. How did you know that?

A. I knew because my brother-in-law—he used to come to discuss things with my husband.

Q. Did he discuss it with you?

A. I was there.

Q. Can you tell about the debt, what she was talking about?

A. No, I can't tell you that. May I say something right now?

Q. No, no, let's get the questions and answers right. Now, how old a woman was Mrs. DuBan at that time?

A. Nobody knew how old she was.

Q. She was eighty-six?

A. I am the one that told them I thought that she was eighty-six.

Q. Let's fix it at eighty-six. She was then an elderly person.

A. Yes.

Q. What was the condition of her health at that time?

A. Well, I think very good.

Q. She wasn't confined to her room?

A. Oh, Lord, no!

Q. All right. When was the last time you saw Mrs. DuBan?

A. That was the last time.

Q. In 1947?

A. That is not the last time I talked to her.

Q. The last time you saw her?

A. That's right.

Q. And the time you had any discussion with her was in 1947 about Mr. Alker.

A. That is right.

Q. She didn't discuss any details with you as to this debt.

A. No, she didn't.

Q. Did she make any mention of the amount of the insurance policy that she was holding?

A. You know you have me. I am afraid to say anything. I am not a liar.

Mr. Alker: If you don't know, why—Who would remember a date when you are sick like you are.

A. No. I don't think she did. She was holding an insurance policy as collateral which she said she was going to return to him.

Q. Did she say to you that Mr. Alker was paying dividends on this?

A. Yes, she did.

Q. Why did you—

A. Dividends—no, I didn't know nothing about that. I asked her who paid the premiums on the policy and she said Harry was. "Well," I said, "that seems the only thing decent to do."

Q. Did she tell you at that time, 1947 or thereabouts, that Mr. Alker was paying her any dividends on any stock?

A. No.

By Mr. Hellman:

Q. Mrs. Bruce, where were you living at the time?

A. On Ontario Street.

Q. What was the address?

A. 2057 Ontario.

Q. East or west?

A. West.

Q. Where was Mrs. DuBan living?

A. In the apartment.

Q. What apartment?

A. 208—

Q. Do you know what apartment house, the name of the apartment house?

A. I know where it was—up there opposite the Drive—201 Cambridge.

Q. The Cambridge Apartments?

A. Yes.

Q. And what time of the day did you get there?

A. In the afternoon.

Q. Would you know about what time?

A. No.

Q. Was it in the winter?

A. No, in the summer. She mentioned the fact the only breeze she was getting was coming from the fire escape.

Q. Who else was in the apartment at that time?

A. Towards the end of the conversation the other old lady was bustling around.

Q. You mean Mrs. Dunwoody?

A. Yes.

Q. She was there at the time of your visit?

A. Not near me at all.

Q. But in the apartment?

A. Going back and forth.

Mr. Alker: Whom do you mean by Edgar was up there until the time she died?

The Witness: I said the old lady.

Mr. Alker: Mrs. Dunwoody isn't so old.

By Mr. Hellman:

Q. Do you know Mrs. Dunwoody?

A. I met her that day.

Q. You met her that day in the apartment?

A. When I got up to leave Mrs. Dunwoody come in the room and she introduced me to her and said she was living there.

Q. Mrs. Dunwoody introduced you?

A. Mrs. Dunwoody didn't introduce me to anybody. Mrs. DuBan introduced me to her.

Q. How did you get to the apartment house?

A. By taxicab.

Q. What is your age?

A. I am seventy.

By Mr. Booth:

Q. Had Mrs. DuBan at any other time discussed any of her business affairs with you?

A. No.

Q. When did you discuss this matter with Mr. Alker?

A. When did I discuss it with him?

Q. Yes.

A. Well, my son-in-law asked me if I had ever talked—

Q. Who is your son-in-law?

A. Mr. Struckman.

Q. She had a conversation with you?

(Discussion off the record.)

A. Mr. Struckman.

By Mr. Hellman:

Q. When did you first discuss it with Mr. Alker?

A. I only discussed it once with Mr. Alker.

Q. When was it approximately—after Mrs. DuBan died?

A. Yes, after Mrs. DuBan died.

Q. How soon after she died, if you can tell me?

Mr. Alker: She doesn't know dates.

Mr. Booth: Do you mind if we ask?

By Mr. Booth:

Q. Approximately how long was it after Mrs. Du Ban died?

A. I don't know. I can't tell you.

Q. Did you discuss it with him personally or over the telephone?

A. Over the telephone.

Q. And how long have you known Mr. Alker?

A. For years.

Q. He was a friend of your husband's?

A. He was—definitely was. He was such a friend that nobody in the darn family ever paid him anything for whatever he did.

Mr. Booth: Strike that out.

Mr. Alker: Leave it in.

Mr. Booth: I do move that that be stricken out. He never paid any of those people

The Court: Well, I don't think it affects anything one way or the other. I don't think it makes much difference whether I strike it out or not. I don't care.

Mr. Booth: I think it ought to be stricken out.

Mr. Gilbride: I offer the entire record here and let it speak for itself as the record shows the objections or whatever appears thereon.

Mr. Booth: The Court is going to rule on it.

The Court: The motion to strike out is per-

fectly proper as far as that is concerned. I think it is almost immaterial, however.

Mr. Gilbride: The question was distinctly asked by Mr. Booth, he was a friend of your husband's?

The Court: Well, she answered he was. And then after that she goes on to say he was such a friend that nobody in the darn family ever paid him anything for whatever he did, all of which is none of our business.

Mr. Gilbride: I take the position that it is responsive to the question.

The Court: I will strike out the latter part of it. I will permit the answer, he was. The rest of it I will strike out. The words he was such a friend that nobody in the darn family ever paid him anything for whatever he did I will strike out. That has nothing to do with this case.

Mr. Baylson: By Mr. Booth:

Q. How do you know?

A. We never paid him. I know he did things for John Bruce and he was never paid for that.

Q. You never paid him anything?

A. We never got a bill.

Q. You don't know anything about the other members of the family, what they may or may not have paid him?

A. Yes, I do.

Q. How do you know?

A. Yes, I do. You can't live with a family twenty years and not know of your—

Q. I want to know whether you know of your own knowledge whether anybody else paid him any money?

A. Only what I heard. Uncle Al would just say, "Call Harry. Let Harry do it."

Q. That's what I thought.

A. That's what you thought. Well, that happens to be what really was going on.

By Mr. Hellman:

Q. How often did you see Mrs. DuBan?

A. Not very often. When you are raising five babies you don't have time to—

Q. Do I understand this was the last time you saw Mrs. DuBan before she died?

A. That is right.

Q. And you never saw her afterward until she was laid out.

A. That's right. We did talk a lot over the telephone.

Q. I understand Mr. DuBan was paying you $50 a month when he was alive.

A. That hasn't any bearing on this. Do I have to rehash that? He took my business—

Q. Were you receiving $25 a month from Mrs. DuBan while she was alive?

A. Yes. She didn't want anybody to know or all the rest of the family would expect the same. I almost said something else.

Redirect examination by Mr. Alker:

Q. Mrs. Bruce, was it before or after you read the article in the paper of the suit of DuBan against—

A. It was before.

Mr. Booth: Objection.

By Mr. Alker:

Q. Was it after she died?

A. Definitely. Ernest and I had talked the estate over and were wondering what was going on. He said something about you. I can't tell you just what.

By Mr. Booth:

Q. As a result of your conversation with your son-in-law—

By Mr. Alker:

Q. Had Mr. DuBan been helping you with the children before Mrs. DuBan gave you $50 a month?

A. Mrs. DuBan didn't give me $50—it was $25.

Q. She helped the other relatives, didn't she?

A. Yes.

Q. When you had this conversation with her it was about the time she settled with Dr. Anders and Mr. Heuer.

A. Yes.

Mr. Booth: I move that is leading. The lady fixed it at 1947.

By Mr. Alkers:

Q. You don't remember what year it was, but it was when those two things took place.

The Court: Do you want a ruling on that? I think it was rather leading. Do you want a ruling on it?

Mr. Booth: Yes.

The Court: I will sustain the objection to that and strike it out.

Mr. Baylson: By Mr. Alker:

Q. What relation was Dr. Anders to her; was he any blood relation?

A. No. He was just a good friend.

Q. Was he Mr. DuBan's doctor?

A. He got hell if Uncle Al got sick. He was not supposed to let him get sick.

Q. Was Mr. DuBan a cripple and more or less an invalid for many years?

A. He was crippled.

Q. He was a very strong-minded individual, wasn't he?

A. You're telling me. Everybody jumped his way, his brother included.

Re-cross examination by Mr. Booth:

Q. Well, now—

A. He cracked the whip.

Q. Was Dr. Anders the physician for Mrs. DuBan?

A. I think he was their family physician.

Q. For a long time?

A. For many, many years.

Q. He was her family physician, is that right?

A. Yes.

Mr. Alker: Was George Heuer, was he a friend of Mrs. DuBan's?

The Witness: Yes, and Mr. DuBan's. She settled with him for fifty cents on the dollar. There was nothing to be had from the doctor because he had gone into bankruptcy. I am only telling what she said to me.

By Mr. Booth:

Q. What somebody else told you.

A. That somebody happens to be Mrs. DuBan.

Q. Did Mrs. DuBan ever say to you that Harry Alker had brought suit against Dr. Anders?

A. No.

Q. That he had recovered a judgment against him?

A. No.

Q. And attached his interest in his father's estate?

A. I told you the conversation I had with Mrs. Du Ban. That is it. Nobody else's judgment or anything else.

Mr. Alker: That she had settled with him and didn't want anything from him.

Mr. Booth: She doesn't know anything about it.

(Discussion off the record.)

By Mr. Booth:

Q. Well, when was your daughter married?

A. 1949.

Q. Would you say that you have another daughter that was married, too?

A. They are all married.

Q. When was your other daughters married?

Mr. Alkers: Now, wait a minute.

(Discussion off the record.)

By Mr. Booth:

Q. How many daughters do you have?

A. Four.

Q. Can you tell us when the different ones were married?

A. I don't think I can. My husband—by God, I can remember that. Don't push me too hard. I am telling you the truth. He died in 1934 and I can remember that.

Q. The girls were all small?

A. They were all small.

Q. The DuBans had no children?

A. No.

Q. Therefore, they felt a certain responsibility to look after the girls.

A. I don't remember whether they did or not. Who the devil cared whether I had beans for the pot or not.

I have read the foregoing transcript of my testimony and I certify that it is true and correct. (Signed) Elva Bruce.

Then it is certified to by the official stenographer.

THOMAS J. HOOKEY, sworn.

By Mr. Gilbride:

Q. Mr. Hookey, what is your employment?

A. Buying and selling real estate.

By Mr. Booth:

Q. What?

A. Buying and selling real estate.

By Mr. Gilbride:

Q. Are you associated with Mr. Alker?

A. Partly, yes.

Q. In what way? Explain it.

A. Doing things for him, filing papers.

By The Court:

Q. You are associated with his office?

A. Yes, sir.

Q. How long have you been employed there?

A. I am not employed. I am just partly employed.

Q. Well, how long have you been partly employed there?

A. About nine years.

Q. You were also employed somewhere else during that time?

A. My office was next door.

Q. Right next door?

A. Yes.

Q. Do you have a general business aside from your services for Mr. Alker?

A. Buying and selling real estate, yes.

Q. Buying and selling real estate in connection with Mr. Alker?

A. No.

Q. By yourself?

A. By myself, yes.

Q. But you are in Mr. Alker's employ?

A. Part-time, yes.

By Mr. Gilbride:

Q. Are you related to the DuBans or do you have any interest in the estate of Mamie DuBan?

A. None whatever.

Q. Did you know Mamie DuBan?

A. I have met her four or five times.

Q. How long had you known her prior to her death?

A. Since about 1945, '46.

Q. Did you know Alfred DuBan?

A. No.

Q. Under what circumstances did you become acquainted with Mrs. DuBan?

A. By going there with her income taxes to sign and her FDIC papers for her to sign.

Q. Did you ever have any conversation with her with regard to any transactions or representations?

A. She always—

Q. That is with Harry Alker.

A. Beg pardon?

Q. With Harry J. Alker, the defendant.

A. Yes. She always said to me, Why do you come up here and bother me?

Q. Answer the question yes or no.

A. Yes.

Q. How many times?

A. Oh, about four or five times, maybe six.

Q. Where?

A. At her apartment.

Q. Where?

A. At Cambridge Manor.

Q. In Philadelphia?

A. On Wissahickon Avenue, yes.

Q. Was anybody else present on any of those occasions besides you and Mrs. DuBan?

A. Only once.

Q. Well, will you tell us the four or five times that you had conversations with Mrs. DuBan?

Mr. Booth: And the dates please.

Mr. Gilbride: I am trying to get that from him.

The Witness: I can't give you the exact dates, Mr. Booth.

By Mr. Gilbride:

Q. Can you give us the years? Let us start that way.

A. Forty-five, forty-six, forty-seven, forty-eight and forty-nine.

Q. The last one was in 1949?

A. Yes.

Q. What was said on the last occasion?

A. The last occasion she said, I have told you before why does Mr. Alker send you up here to sign these papers when I am not interested? I have settled with him. I have told him I would give him back his stock and his insurance policy as soon as I am able to get it out of—

By The Court:

Q. His stock?

A. The stock that she had.

Q. What stock?

A. Smith Pie.

Q. I don't understand this. I understood you to say she was giving him back his stock.

A. She will give him back his stock.

Q. His stock?

A. Yes.

Q. Did she have it at that time?

A. Had it in the safe deposit box.

Q. She had it in the safe deposit box but not in her possession?

A. No, sir.

Q. But she said she had given it back to him?

A. No. She said she was to give it back to him.

Q. But she didn't say she had given it back?

A. No.

Q. Did she at any time say she had given it back to him?

A. No.

By Mr. Gilbride:

Q. And what did she say with regard to the insurance policy?

A. She said she would give it to him as soon as she could get to the safe deposit box.

Q. Do you know of your own information why she had that Smith Pie and the insurance policy belonging to Alker?

A. No.

Q. Have you given us the full conversation on that date in 1949?

Mr. Booth: What date are you talking about?

Mr. Gilbride: 1949.

Mr. Booth: All right.

The Witness: She said that she had settled with others like Heuer and she wanted to get it off her mind and have a clean slate with Mr. Alker.

By The Court:

Q. But she did not say that she had done it with Mr. Alker, did she?

A. She said—

Q. I gather you are now telling us that she expressed an intention to do something; is that correct?

A. She said she had already agreed to do so.

Q. But did she say she had done it?

A. Yes.

Q. Well, you didn't say that in the beginning. Now you say she told you she had given him the thing—

A. She hadn't given him the stock and the insurance policy.

Q. She hadn't delivered them to him?

A. No, because she hadn't been out.

By Mr. Booth:

Q. She hadn't been out?

A. She hadn't been out to go to the box.

By The Court:

Q. She said that to you?

A. Yes.

By Mr. Gilbride:

Q. What did she say to you on the first occasion in 1947 and, by the way, can you place it more definite than the year? Can't you say the month or the season?

A. Well, you see, I only took the papers up there for her to sign when he was filing the application down in Washington.

Q. Answer my question. In 1947 what was said?

A. Just what I said.

Q. The same conversation?

A. She always said that. Why do you bother me? I am finished with it.

Q. And that she had settled with Alker; is that what you said?

A. Yes.

The Court: What is that?

Mr. Gilbride: I asked him if that is what she said.

The Court: You are leading now. This is your witness. You can't put words in his mouth. You will get him confused if you do that.

By Mr. Gilbride:

Q. She had the same conversation with you on at least five times?

A. Yes.

Q. What brought the conversation up? Did you advance it or did she?

A. I never advanced anything. She always voluntarily said whatever she wanted to say. And when I would take her Christmas present up she would always say, Well, I hope you are not coming up to have more papers signed.

By The Court:

Q. But every time you went to have papers signed did they have anything to do with the question now before us, the papers you were getting signed?

A. It was the FDIC papers.

Q. But that had nothing to do with this situation.

A. She was one of the parties.

Q. But she just voluntarily told you each time that she had given or was going to give—

A. Yes. She didn't want to be annoyed with it.

Q. Which did she say, that she had given it or she was going to give it?

A. She said she was going to give it back to him.

Q. But she hadn't given it back at that time?

A. No.

By Mr. Gilbride:

Q. This stock that you are talking about, that was not the National Dairy stock; that was the Smith Pie stock?

A. That is the Smith Pie stock.

Q. Did she ever have any conversation with you with regard to the National Dairy stock and its dividends?

A. No.

CROSS-EXAMINATION.

By Mr. Booth:

Q. Now you are talking about a policy which she

said she was going to return. But she never told you that she had returned it, did she?

A. She never did.

Q. And she never told you that she had returned the Mrs. Smith Pie stock either, did she?

A. No.

Q. Now your primary purpose whenever you went to see her was to get her to sign either her income tax or some papers in the litigation in which Mr. Alker had become involved with the Federal Deposit Insurance Company; is that correct?

A. Both of them were involved in it.

Q. What do you mean, both of them?

A. Mrs. DuBan was.

Q. Well, Mr. Alker was carrying that litigation along and he is still carrying it on, isn't he?

A. She always had to sign the papers.

Q. Well, she hadn't signed anything since she died, has she?

A. No.

Q. And she hadn't signed anything for a number of years before she died, did she?

A. Oh, yes, she did.

Q. Her concern was that she should be bothered about some litigation he was carrying on. That is a fact, isn't it?

A. She contended she had settled with him.

Q. What did that settlement with him have to do with signing these papers with the Federal Deposit Insurance Company?

A. I don't know that.

Q. And you mean to say because you asked her to sign these papers with the litigation with the Deposit Insurance Corporation that she blurted out to you that she had made some settlement?

A. Yes.

Q. Which had nothing to do with the Federal Deposit Insurance litigation.

A. She said she didn't want to be annoyed.

Q. About what?

A. Signing any papers.

Q. The signing of the papers had to do with reference to the litigation with the Deposit Insurance Company?

A. That is correct.

Q. And that is what she didn't want to be bothered with?

A. She said she didn't want to be bothered with signing papers for anything.

Q. For anything?

A. Pertaining to the FDIC.

By The Court:

Q. Well, did she sign them for you?

A. Yes, sir.

Q. But she said she didn't want to be bothered?

A. Didn't want to be bothered. But she always signed them.

By Mr. Booth:

Q. Let us get it straight. Those papers that you were getting her to sign were either income tax returns or papers with reference to the litigation with the Federal Deposit Insurance Corporation?

A. That is correct.

Q. Is that right?

A. That is correct.

Q. And she didn't want to be bothered with that litigation?

By the Court:

Q. Is that correct?

A. Yes, sir.

By Mr. Booth:

Q. When you went to this apartment what room was it?

A. I went in the hallway to the dining—to the living room and then into the dining room.

Q. Well, what was the number of the apartment?

A. What was the number?

Q. Yes.

A. 208.

Q. Who let you in?

A. I think the maid did. I am not sure.

Q. Was Mrs. Dunwoody there?

A. I don't know Mrs. Dunwoody.

Q. Did you ever meet Mrs. Dunwoody there in that apartment?

A. No, I never was introduced to her.

By the Court:

Q. Well, the question was did you ever meet her?

A. No. I don't know the woman.

By Mr. Booth:

Q. So that when you got there there was nobody there except you and Mrs. DuBan; is that correct?

A. I was let in, I presume, by a maid. I don't know.

Q. Well, there was nobody in the room when you were there to sign the papers?

A. No.

Q. But she did display a great deal of reluctance about signing those papers, didn't she?

A. She did reluctantly sign any papers. She didn't just want to be annoyed with me coming up there with them.

Q. When was the first of these conversations? I understood you to say in 1945.

A. '45.

Q. '46?

A. '46, '47. Practically every year.

Q. And she repeated the same conversations to you every time you went there?

A. Not every time, no.

Q. How many times?

A. I would say three or four times.

Q. Three or four times out of five times that you were there she told you this same story?

A. Yes.

Q. Without any variation?

A. No variation whatever.

Q. When she talked about returning an insurance policy sometime in the future when she got to her safe deposit box, as you say, was there any mention of the company that the policy was in?

A. She never went into details. I was only a messenger.

Q. You were only a messenger?

A. That was all.

Q. You said the first time you were there that she did mention a life insurance policy, didn't she?

A. She said she was going to return the life insurance policy and the stock.

Q. What policy was she talking about?

A. Some life insurance policy.

Q. Don't you know what it was?

A. No.

Q. Not the name of the company?

A. I never inquired about it. It was none of my business.

Q. But you did inquire about the pie company stock, didn't you?

A. I knew that because she mentioned it.

Q. But she didn't mention the policy?

A. She did not mention the name of the company, no.

Q. Now, you said you were a part-time employee of Mr. Alker; is that right?

A. That is correct.

Q. How much time do you spend there?

A. Sometimes a couple of hours a day. Sometimes all day.

Q. Sometimes all day?

A. Sometimes half the night.

Q. And you are paid on a weekly basis?

A. No, sir.

Q. How are you paid?

A. I just couldn't explain that to you.

By The Court:

Q. Oh, you can give us some faint idea. You get paid, don't you?

A. Oh, yes.

Q. Suppose you begin with the time you get paid and then go backward to see what the source of it was, and that will help you think your story out, I think.

A. I am not on a salary basis, if that is what you want to know.

Q. What are you on? Don't give us the negatives. Give us a couple of positives and then we will get there.

A. I would say $75 a week I make out of his office, maybe a hundred.

By Mr. Booth:

Q. How do you make it?

A. Selling real estate.

Q. For him?

A. I have sold real estate for him, yes.

Q. Is that the only way you make money there?

A. Serving papers.

Q. So you average, you say, out of his office $75 a week?

A. Yes.

Q. And that has been going along for what, nine or ten years?

A. No. That has been going along since 1950.

By The Court:

Q. I noticed you said part of that income was from selling real estate for him.

A. Yes.

Q. Is that where you get your income?

A. No. That is extra. The selling of any real estate is entirely different.

Q. He pays you extra for that?

A. Yes, sir.

By Mr. Booth:

Q. You get $75 a week from him?

A. I average that.

By The Court:

Q. Well, is that a steady pay that he gives you, $75 a week; a minimum of what he gives you?

A. It is not a minimum. The minimum is fifty.

Q. The minimum is fifty?

A. Yes.

Q. What establishes the minimum?

A. I can't tell you that.

Q. If you are at the rate of $75 a week—

A. Sometimes I don't do so much work.

Q. Then by agreement with him are you then saying that you say don't make it seventy-five?

A. I don't make anything. He makes it.

Q. He comes and says not seventy-five but fifty?

A. He just writes out the check.

Q. And he hands it to you for $50 and you don't ask any questions about it?

A. I don't.

By Mr. Booth:

Q. In other words, if Mr. Alker gives you $50 and you think you ought to have $75 a week, you don't open your mouth about it, do you?

A. No. Some weeks I run a whole lot more than that if I am lucky enough to sell real estate.

Q. For him?

A. Yes.

Q. Do you sell it for other people?

A. Yes.

Q. Are you a licensed real estate broker?

A. No.

Q. During the time you were doing this work were you? It is pretty hard to find out just exactly what you mean by some of these answers. I asked you clearly whether or not you were a broker when you sold real estate for others.

A. No, not in the last three years.

Q. Then you do not have a broker's license?

A. No. I gave it up.

Q. When did you give it up?

A. Four years ago.

Q. You did have a license?

A. Yes.

Q. And you gave it up?

A. Yes, sir.

By Mr. Booth:

Q. Then since then you have been working exclusively in Mr. Alker's office?

A. No.

Q. Well, how can you work as a real estate broker selling—

A. I am not working as a real estate broker.

Q. How do you sell real estate for other people if you are not a licensed broker?

A. I go out and buy real estate myself.

Q. Oh, you are a speculator?

A. Yes.

Q. Mr. Hookey, when you had the first conversation that you related here with Mrs. DuBan did she

say at that time she was going to return this life insurance policy or a life insurance policy?

A. She said she was going to return a life insurance policy.

Q. But she didn't enumerate the number or the name of the company or the amount of the policy?

A. No.

Q. So you didn't know whether it was $5,000 or $500?

A. No.

Q. But you did know about the Smith Pie stock; is that right?

A. I didn't know how much it was.

Q. You didn't know how many shares there were of Smith Pie?

A. No.

Q. Did you relate these conversations to Mr. Alker?

A. Oh, yes. I told him when I came back what she said.

Q. And you have been around Philadelphia in the real estate business for a good many years, haven't you?

A. A great many.

Q. Was there any written agreement ever signed to your knowledge between Mrs. DuBan and Mr. Alker?

A. I wouldn't know that.

Q. You wouldn't know that?

A. No.

By The Court:

Q. Did you know it or didn't you know it?

A. I didn't know it, no.

By Mr. Booth:

Q. Did I understand you correctly that in 1945 when you had the first conversation with Mrs. DuBan she said she was going to return that policy to him?

A. Yes, sir.

Q. And from 1945 on to 1949 these times when you saw her what was her physical condition?

A. I would say her physical condition was good.

Q. She was able to—

A. Outside of her eyes.

Q. She was able to move around, wasn't she?

A. Oh, yes.

Q. Nothing to prevent her from going to the safe deposit box?

A. I don't know anything about that.

Q. Well, now I am asking you from her physical condition what you observed. Would there have been anything to stop her from going to her safe deposit box?

A. That I couldn't answer because I don't know.

Q. Did she walk across the floor?

A. She walked across the dining room floor, yes.

Q. She was not immobilized? She was ambulatory, wasn't she?

A. She could walk.

Q. Who left you in at this apartment when you went there?

A. I told you.

Q. The maid?

A. I thought the maid.

Q. Mrs. DuBan never left you in, did she?

A. Once she did, yes.

Q. When you went there did you generally find the door locked?

A. The door was always locked when I went there.

Q. Always locked?

A. Yes. I always had to use the knocker.

Q. You had to use the knocker. And they had a peep hole there, didn't they?

A. That I don't know.

By The Court:

Q. What time of the day did you go there?
A. Around between five and six on my way home.
Q. In the evening?
A. Yes.

Mr. Booth: That is all.

HORACE S. RHOADS, recalled.

Mr. Gilbride: If your Honor please, I take it that Mr. Booth is now continuing his cross examination of this witness. Is that right?

Mr. Booth: Yes. I only want to ask him one question.

CROSS-EXAMINATION.

By Mr. Booth:

Q. In the first conversation you had with Mrs. DuBan and mention was made as to an insurance policy, what year was that?
A. That was in 1948.
Q. When?
A. '48.
Q. What time of the year?
A. I would say it was in September.
Q. Of 1948?
A. Yes.
Q. Did she mention the amount of the policy?
A. Yes.
Q. And the name of the company?
A. Yes.
Q. What was the name of the company?
A. Metropolitan Life Insurance Company.
Q. And the amount of the policy?
A. $50,000.

By The Court:

Q. How much?

A. $50,000.

Mr. Booth: That is all.

RE-DIRECT EXAMINATION.

By Mr. Gilbride:

Q. Mr. Rhoads, the conversation was about this insurance policy. Was there any conversation about the Smith Pie stock at those times?

A. Yes. But she didn't mention the amount of the Smith Pie stock. She just mentioned the Smith Pie stock as the Smith Pie stock.

MARION ALKER, sworn.

By Mr. Gilbride:

Q. Where do you live?

A. 724 Swede Street, Norristown.

Q. You are related to Mr. Alker, aren't you?

A. I am his sister.

Q. Do you have any interest at all in the DuBan estate?

A. Oh, no, no.

Q. Are you employed or do you have a profession?

A. No. I file for my brother.

By the Court:

Q. A file clerk?

A. Well, I am really, I guess.

By Mr. Gilbride:

Q. Did you know Mrs. Mamie DuBan?

A. Very well.

Q. How long?

A. I couldn't tell you just exactly how long that I have known her, but I have known Mr. DuBan since 1920. And I can't just say exactly when I met Mrs. DuBan, but it was after Mr. DuBan.

Q. Well, would you say for years you had known Mrs. DuBan?

A. Yes.

Q. Under what circumstances did you know them?

A. Oh, very friendly. We used to go there two and three times a week.

Q. Who is we?

A. My brother and I and the Heuers and the Anders and the Fords.

Q. Socially?

A. Socially.

Q. During the lifetime of Mrs. DuBan did you ever have any conversation with her?

A. Oh, plenty.

Q. You didn't give me a chance to complete the question. With regard to any business or professional transactions that she had with your brother.

A. Yes, I have.

Q. Frequently or infrequently?

A. Well, it was very frequently. And then I was taken with ear trouble and I wasn't able to talk over the telephone and I wasn't able to go see her because I had ear abscesses.

Q. When was the last time you saw her?

A. Well, I saw her in the very heat of the summer. She died in November. I remember that. And I saw her in July or August.

Q. Of what year?

A. Well, whenever she died. I don't know.

Q. Do you know—

A. Well, I know she died in November because it was very near the date of my mother's death.

Q. How many years ago?

A. Oh, I don't know.

Q. Fifty-three?

A. Fifty-three was it?

Q. Well, I am asking you.

A. Well, I don't know. I don't know what year she died right now.

Q. When was the last time you had any conversation with her with regard to transactions with your brother?

A. Well, it was either in July or August because it was a bitter hot day.

Q. Of the summer of the year she died?

A. That's right. She died in November and I was out there it was either July or August, but I wouldn't know which month.

Q. Where did this conversation take place?

A. In her own apartment.

Q. Was anybody else there?

A. No. When I did go the doorman called up and then I went up and the door was unlatched. But I couldn't hear whether they were saying come in or what they were saying, for I was almost stone deaf. Then when I went in the maid was running the vacuum cleaner and she went into the dining room to run the vacuum cleaner and Mrs. DuBan was sitting by the window. And Mrs. Dunwoody, her sister, was not well and she was in her room. And she told Winnie to tell her to come out, but she didn't come out for a long time.

By Mr. Booth:

Q. Who is she?

By Mr. Gilbride:

Q. Who is she?

A. Mrs. Dunwoody.

Q. Yes.

A. She was Mrs. DuBan's sister.

Mr. Booth: I don't get who wasn't feeling well.

Mr. Gilbride: Mrs. Dunwoody.

The Witness: I am not talking very loud, I guess.

By Mr. Gilbride:

Q. Who wasn't feeling well?

A. Mrs. DuBan said Mrs. Flossie—she called her Flossie—Florence wasn't well.

Q. Wasn't it your habit to go up there socially without an appointment and just walk in?

A. Well, I used to go there socially. But this day there wasn't anybody available to take something up, so my brother asked me if I would take it up.

Q. Why did you go there that day?

A. I took a paper for her to sign on the FDIC thing. They are in it together. For her to put her signature on it so it could be opened up.

Q. What was said and by whom?

A. Who do you mean, Mrs. DuBan?

Q. Yes, you and Mrs. DuBan.

A. She said that she wasn't able to sign that paper; that she had just put drops in her eyes. I knew she had been very sick with her eyes. And she wasn't able to sign the paper. And I said—well, I don't know what I said. I was trying to persuade her. I said, Well, Mrs. DuBan, I will read it to you. I don't think it is anything—only for Mr. Alker to go on with the case. I said, I think that is all it is.

I don't understand the legal things too much myself. So I read it to her. And she said, I don't know why—she always called him Mr. Alker—I don't know why Mr. Alker bothers about this. She said, He oughtn't to worry about this. He has done so much for me and he has done so much for my family and so much for Mr. DuBan, and I don't know why he worries so about it.

Well, I said, he does worry about it.

And she said, As soon as I can get down to the box I am going to give him back his Smith Pie and his insurance papers and, she said, I am just not able to get there. And she said, He has fulfilled all his promises and he paid the interest on the stock promptly. It is

always prompt. And she said, I don't like this. She said, I want peace.

And Mrs. DuBan was a great person for repeating things. She would say something and she would say it over and over again. She would say it over again and over again the same thing.

Q. Did she tell you why she was going to return the insurance policy and the stock?

A. She said Mr. Alker had fulfilled his promises.

Mr. Booth: Wait a minute.

The Witness: And Mrs. DuBan and I was there when the whole thing was hashed over with Mr. DuBan. I myself was there.

By Mr. Gilbride:

Q. When was that?

A. Well, in 1929.

Mr. Booth: I object to that.

The Court: That is pretty far back.

Mr. Booth: Yes. Hashed over with Mr. DuBan.

Mr. Gilbride: That is when all this trouble started. It was back in the twenty-nine depression when stocks and securities—

The Court: It really preceded the situation that exists. It is rather remote.

The Witness: Mr. DuBan was a very powerful person. He was a wonderful friend. And he would have done anything for my brother. And he did a great deal for me. When I was sick for five months every Saturday night he sent me white carnations.

Mr. Booth: Well, that is very nice but I think it is entirely irrelevant to this issue.

Mr. Gilbride: Well, let me get her back on the subject.

By Mr. Gilbride:

Q. I am talking about any conversation that you had with either Mr. or Mrs. DuBan with regard to their—

Mr. Booth: I object to any conversation with Mr. DuBan.

By Mr. Gilbride:

Q. Well, then Mrs. DuBan. We will confine it to Mrs. DuBan. With regard to this National Dairy stock and his representation of the family; the transactions between them.

A. She said that—

Mr. Booth: Now just a minute. I object. I object to any answer by this witness as to any transaction that took place prior to the loan of this stock in 1930 and '31.

The Witness: There are more people than I that know all about this thing.

By Mr. Gilbride:

Q. Now, Miss Alker, set the date that you are now going to talk about. When did this conversation take place that you are now going to testify to?

A. With whom?

Q. Mrs. DuBan.

A. Oh, well, several times that she has discussed it. But the last time was right before she died.

Q. What was the time before that?

A. Well, I don't remember. I was sick for two years, I wasn't any place.

Q. Well, would you say how many years before the last time—

Mr. Booth: She just said she doesn't remember.

Mr. Gilbride: Do you want to ask the questions and we won't have the interruptions here? I am

having difficulty with the witness, if your Honor please.

The Court: That won't stop the interruptions if he asks the questions. Experience teaches me better than that. Ask your question again and we will see.

By Mr. Gilbride:

Q. What was the time that you had a conversation with Mrs. DuBan prior to this last time which was the summer of 1953?

A. Well, I don't know. We were there several times with the Heuers.

The Court: She said she doesn't know.

Mr. Gilbride: All right.

The Court. If she doesn't know there is no use in asking her.

The Witness: It was prior to my ear trouble.

By Mr. Gilbride:

Q. Was it in the last ten years?

A. Yes.

Q. What was said?

A. Now as I say—

Mr. Booth: Just a minute. Let us get some time here.

Mr. Gilbride: Let us take the last conversation.

The Court: You will have to fix a time for something before you can build anything up on it, because you have got to have a foundation of some kind.

By Mr. Gilbride:

Q. The last time was in the summer of '53?

A. That's right.

Q. You say at her apartment?

A. That's right.

Q. What did she say then?

Mr. Booth: She just testified—

The Witness: She told me—when I asked her to sign the paper she said, I don't know why Mr. Alker is fussing so about this. I don't like to make any—she said, I have cleared everything up with George Heuer and I have cleared everything up with Anders and I have cleared everything up with Mr. Alker. And she said, I want peace.

And I think Mrs. DuBan was really under duress a lot of times.

By Mr. Booth:

Q. What?

A. She was under duress.

By The Court:

Q. By whom?

A. By people.

Q. Can you be definite about that?

A. Well, I could tell you but I wouldn't tell anybody else.

Q. I appreciate the confidence, but I can't take it that way.

A. Well, I am not going to say anything then.

Mr. Booth: Then I ask that it be stricken out.

The Witness: That was the inference.

The Court: Don't tell me anything confidential. This is a trial.

Mr. Gilbride: Strike it out.

By Mr. Gilbride:

Q. Now the time before the summer of '53—

A. Well, I tell you Mrs. DuBan went over the

same thing over and over and over in about five minutes.

Q. The same thing.

A. Do you understand what I mean? She would say, I have told Mr. Alker I am going to get the stock and give it to him. Then she would repeat it and repeat it and repeat it.

By The Court:

Q. And that was on a number of different occasions that she kept saying she was going to do so and so?

A. Anytime. She called me on the telephone one time and she told me the same thing.

Q. And said she was going to do what?

A. That she was going to give Mr. Alker the stock and the—the pie stock and the insurance papers when she got to the box.

Q. Did she ever tell you that she had done it?

A. No. She was going to do it when she got to the box; that she had told Mr. Alker that she was going to do it; and that he had done a great many things for her and the family.

By Mr. Gilbride:

Q. Now you say that you and your brother had social activities and companionship through all the years—

A. Absolutely. We went out on his boat in the summertime every Tuesday and we went down and had dinner two or three times a week.

Q. Do you know of your own knowledge over what years your brother acted as attorney for the DuBans and the family?

A. Well, my father died in 1920. This is the first I know. And I wouldn't know—

Q. Well, from 1933 on.

A. Well, in 1920 was the first I knew because my father died, and he was having settlement for their

property then. And we didn't get home right away. He was in the settlement.

Q. Down through the years your brother represented—

A. 1920, that was the first time I met Mr. DuBan. He came up to my father's funeral.

The Court: This is getting a little remote from the issue, isn't it, 1920?

By Mr. Gilbride:

Q. Mrs. DuBan didn't want to be bothered and she said the thing was all over?

A. She said it was all over.

Q. Was Mr. Alker to do anything at all?

Mr. Booth: Wait a minute. That is certainly leading.

The Court: This is your witness. You have got to remember that.

Mr. Gilbride: That is all.

CROSS-EXAMINATION.

By Mr. Booth:

Q. Miss Alker, you are employed in your brother's office?

A. Well, I go at night and put papers away.

Q. And you have been employed there for a good many years, haven't you?

A. Well, not too awful many.

Q. Of course you have no interest in the DuBan estate?

A. No, I do not.

Q. But you have an interest in your brother, don't you?

A. I certainly do.

Q. And you would do anything you could for him, wouldn't you?

A. He has been like a father to me.

Q. Tell me, will you, if you can, when was the first time that you had this kind of a conversation where Mrs. DuBan said she was going to return the policy and the pie company stock to your brother?

A. Well, it was during the time she was trying—the Anders and the Heuers and Bud—she was trying to get that all cleaned up.

Q. Give me the date.

A. Well, I wouldn't know.

Q. Couldn't you give me the date of that?

A. No. Of course not. But it was while—it was while she was in this apartment that she was in when she died.

Q. Well, she lived there at the time Mr. DuBan died in '38, didn't she?

A. Yes, I guess she did.

Q. And continuously on?

A. I guess she did.

Q. How many times did she repeat this conversation to you?

A. Oh, my, all the time.

Q. Many times?

A. Oh, yes.

Q. And how many times did you see her in the course of a year?

A. What?

Q. How many times would you see her in the course of a year?

A. Oh, I saw a lot of her. But then I was taken with twenty-two abscesses.

Q. And every time you saw her she would repeat this same conversation?

A. She repeated the same old—

Q. The same old thing every time you met her?

A. That is right.

Q. Did you ever ask her, now, Mrs. DuBan, you say you are going to do this. Have you done it?

A. No. I wouldn't humiliate myself or her either.

Q. Well, I am not asking you about humiliation. I am asking you if you ever asked her if she had actually done it?

A. Of course I didn't. Would you?

Q. It is not a question whether I would or not. But if I were interested in it and a person had told me that so many times I would say, well, why haven't you done it.

A. Well, I wouldn't say that to her.

Q. Well, you never said that to her?

A. No. I wouldn't say that to her. I wouldn't say it to anybody.

Q. Did you know the amount of the insurance policy you say she was talking about?

A. No. I don't know the amount of that. But I knew she had them. And Mr. DuBan didn't ask her to—for him to give anything. Mr. DuBan said everything would clear up.

Q. Just a minute. I am not asking you what Mr. DuBan said. I move that be stricken out.

The Court: We will have to strike it out.

By Mr. Booth:

Q. When you saw her in August of 1953 she was in pretty bad physical condition, wasn't she?

A. No. I was surprised—

Q. Was she able to walk?

A. Indeed she was. A man came in with a radio and she just hopped up like usual. And I said to her, I said, Mrs. DuBan, why you look wonderful. I am really surprised.

Q. What was the condition of her eyesight?

A. She said she had drops in them. But when a man came in from—I think there was a little influence—

when the man came in with a radio she jumped right up and she ran over to him and she said, Oh, Mr. So-and-so. Why, she was light as a feather.

Q. You mean she ran over to greet this man?

A. She went right over to him and introduced me to him.

Q. When you got there what time did you generally go there?

A. I went there—it was around—well, it was in around noontime. About one o'clock or something like that. Around that time. It was early afternoon.

Q. Who would leave you in?

A. Well, nobody left me in.

Q. How did you get in?

A. Well, I asked the doorman for Mrs. DuBan. And when I got up to the door the door was unlocked. It was open a little bit. Well, I knocked on the door and I knocked on the door and I could hear the vacuum cleaner running.

Q. That is one time. The vacuum cleaner wasn't running all the time, was it?

A. It was running when I was at the door.

Q. When is this, in August of '53?

A. Yes. You asked me when I got there—

Q. But on other occasions how did you get in?

A. How did I get in other times?

Q. Yes.

A. Oh, well, I don't know.

Q. Did you ever meet Mrs. Dunwoody there?

A. I never met Mrs. Dunwoody there but once in all the time that I ever went there. And then she was sick.

Q. You don't know Mrs. Dunwoody was living there?

A. Yes, I do know Mrs. Dunwoody. Mrs. DuBan told me she was ill.

Q. Now your primary purpose on this visit in August of '53, as I recall your testimony, in July or August, was to get some papers signed?

A. Yes. It was a paper.

Q. And that was all you went there for?

A. Well, that was all I went there for. But I liked to go see Mrs. DuBan.

Q. And each time you went up there Mrs. DuBan —if I am wrong, correct me—would burst out with this statement about having made a settlement with all of these people and a settlement with your brother?

A. Yes, that's right.

Q. Is that right?

A. That's right. She always did that. She would get on one subject and she would repeat and repeat and repeat, no matter what the subject was.

Q. Did you ever report these conversations that you had with her to your brother?

A. Do I recall any—

Q. Did you report them to your brother?

A. Well, I told him how well I thought she looked.

Q. Did you tell him what she had said about this settlement with him?

A. Well, I guess I did. I don't remember that.

Q. Didn't you think it was important enough?

A. Well, she had said it before.

Q. Well, I mean any time she said it did you report it to him?

A. Oh, yes.

Q. You reported it to him?

A. Yes. To tell the truth, he never told me she had it.

Q. Of course you know she was a very old person?

A. Well, she didn't act it. She didn't look it.

Q. You say in August of 1953 she was so well that she just jumped up and ran to the door to get the television man?

A. I don't know how well she was. When I went there she told me she just had drops in her eyes. Then Mrs. Dunwoody came in and said that her sister couldn't sign the paper. Well, I said, Mrs. DuBan, I am sorry I didn't call you up and let you know. I should have done that.

I should have called her up and told her I was coming, but I didn't do it.

And I said to her, I said, You really look wonderful.

And she did.

Q. When did you start to have your trouble with your ears?

A. Oh, I have had trouble with my ears for a long —well, first I had trouble about—gosh, I don't know. Maybe '47. I had a spell of abscesses then—mastoids.

Q. When did you start wearing a hearing aid?

A. I didn't start to wear a hearing aid then.

Q. When did you start wearing a hearing aid?

A. Oh, I don't know that either. It seems ages.

Q. Did you have it on with you all these times you were at Mrs. DuBan's house?

A. I had it on because I wouldn't be able to hear. I always put it on. But I don't wear it all the time because my ear seeps.

Q. Did you ever have any conversations with Mrs. Dunwoody while you were there?

A. Only she didn't seem to want Mrs. DuBan to sign the paper.

Q. Did you ever meet Miss Loevner there?

A. No, I never saw Miss Loevner there. The only secretaries I ever knew were Mrs. Somers and Miss Hansen.

Q. You would generally get there around what time in the afternoon?

A. Oh, I was never there in the afternoon before.

Q. In the morning?

A. No. I always went at night.

Q. At nights? And there was nobody there except Mrs. DuBan?

A. Or the maid.

Q. So far as you were concerned—

A. The maid, she was running the vacuum cleaner.

Mr. Gilbride: If your Honor please, at this point I offer into evidence the interrogatories and the defendant's answer to the interrogatories as filed of record in this case.

Mr. Booth: I object to that.

The Court: What is your ground?

Mr. Booth: Well, the interrogatories are only part of the pleadings here in order to elicit information so that the plaintiff can prepare its case, that is all. They are not evidence. They are here as part of the record.

The Court: Where were those interrogatories taken?

Mr. Booth: I don't think the taking of interrogatories and the asking of interrogatories makes it part of the evidence by offering it in evidence. It is part of the record. I don't think that it is necessary—

Mr. Gilbride: I offer in evidence the interrogatories and the answers of the defendant. May they be accepted for my next point and discussion?

Mr. Booth: For what purpose?

Mr. Gilbride: The purpose is this man was called on by process of law to submit to questions in the interrogatories which I believe in my theory should be before this Court.

The Court: You mean Mr. Alker?

Mr. Gilbride: Yes, sir. And pursuant to that order to answer in writing under oath he filed his answers. I contend in my next discussion here in the next few minutes that that was a process where he was compelled to submit to cross examination. I ask your Honor to introduce the interrogatories for the purpose of determining just how far they went, because my argument is going to be based on that. I contend they went beyond the Dead Man's Rule and the testimony of Mr. Alker becomes relevant and admissible. And that was the next point in my discussion here.

Mr. Booth: The interrogatories today probably take the place of the old rule for more specific statement or for a more specific affidavit of defense. All we asked this man was—he had alleged in his new matter that some time after 1943 he had this alleged oral agreement with the decedent under which he was to be relieved of any responsibility or liability if he paid to her the dividends and made her no charge. Now all we asked him was to state the date or the approximate date there was entered into between you and the plaintiff's decedent, Mamie DuBan, the alleged oral agreement to the effect that if you would pay promptly to Mamie DuBan each quarter an amount equal to the dividend she would have received on the unreturned stock so long as she lived, any further obligation on your part personally to return any stock then unreturned would terminate and cease, as averred by you in paragraph fifteen of new matter.

Now all he answered is that the oral agreement was entered into by Mr. DuBan shortly after Mr. DuBan settled with George C. Heuer in the fall of 1949.

Now all that did was to try to nail down this

defendant to some reasonable date instead of wandering all over from anytime from 1943 on. And in his answer he further said that the alleged oral agreement was entered into sometime in 1949. So it at least narrowed him down to six years.

Now I don't see any purpose of the interrogatories nor do I see how his answering these interrogatories opens the door so as to make Mr. Alker a competent witness in this case where the plaintiff represents the decedent's estate, he being an adverse party.

The Court: Well, I don't suppose it does.

Mr. Booth: So therefore I can see no purpose in having these interrogatories and the answers to them introduced in evidence because I don't think they are relevant. I think they are part of the pleadings.

The whole purpose of Mr. Gilbride's argument here is this; that because we asked this man to be more specific and state when and where this alleged oral agreement was made in these interrogatories, that consequently opened the door and made him a competent witness.

Mr. Gilbride: Yes.

Mr. Booth: Well, I could not agree to that and I don't think any court will.

Mr. Gilbride: I would like to submit a brief.

The Court: If you both talk at the same time you can't expect me to get anything out of this. And you persistently interrupt just about the time the other side has led up to the problem.

Mr. Booth: The whole effort of Mr. Gilbride is this; he is trying to get these interrogatories and the answers admitted as evidence. And he

thinks that by that method and because we asked the defendant, an adverse witness to this decedent's estate, to state more specifically when and where this alleged oral agreement was made, that that opens the door to Mr. Alker and renders him competent to testify to anything and any transactions that took place between him and the decedent. And I say that that cannot be so.

The Court: It would be a strange thing if it were so.

Mr. Gilbride: If your Honor please, the only way I respectfully say that it can be determined whether or not they opened the door here on this Dead Man's Rule is to read the question which they submitted in the interrogatory.

The Court: I will sustain the objection that counsel has made.

Mr. Gilbride: Your Honor will give me an exception.

The Court: Yes.

Mr. Baylson: If the Court please, besides the filing of these interrogatories the plaintiff has opened the door to the defendant by reason of the witnesses which the plaintiffs themselves have brought on the stand today. That is an additional reason for our contention that the door has been left open by the papers that have been filed and the practice before the court today in letting the door open for the defendant to present his testimony. And I think it is a mistake, your Honor, for Mr. Booth to say that the purpose of the interrogatories was solely to make more specific the answer or counterclaim of the defendant. If he wished to attack the sufficiency or insufficiency of the defendant's answer and counterclaim; the way

was open to him but not by filing written interrogatories.

The Court: Did you notice I had ruled on what you are arguing?

Mr. Baylson: Your Honor, I am trying to present additional reasons.

The Court: I can't listen to all the lawyers in the case.

Mr. Baylson: Well, there are two of us on our side.

The Court: I understand. But one man tries the case.

Mr. Baylson: I realize that.

The Court: Sometimes there are eight or ten lawyers in a case but I certainly can't let them all try it. They decide amongst themselves which one is to try the case. I have ruled.

Mr. Baylson: Your Honor, I am trying to give you additional reasons.

The Court: I have ruled on the argument that was presented by your side.

Mr. Gilbride: If your Honor please, may I have the opportunity of filing a short brief on that point?

The Court: You had that opportunity and you could have filed it in time for me to have studied it.

Mr. Gilbride: I can hand up now a memorandum.

The Court: I don't want it now. I have ruled.

Mr. Gilbride: May I offer now the deposition of Mr. Alker into evidence?

Mr. Booth: Well, I will object to that.

The Court: Why?

Mr. Booth: Because of the Dead Man's Rule.

The Court: I think that is right.

Mr. Gilbride: Exception please.

The Court: All right.

Mr. Gilbride: If your Honor please, may I hand up a very short brief within a day or two?

The Court: After I have ruled I stand on it. I am not going to change that ruling.

Mr. Gilbride: Can I have an exception on record to your Honor's ruling?

The Court: You don't need an exception. You have objected to my ruling. That is all you need.

Mr. Gilbride: If your Honor please, we have proceeded down to the complaint and the answer to the complaint. Now we have the issue of a counterclaim. May I have a further opportunity to present evidence in support of the defendant's counterclaim?

The Court: Well, I suppose if you have a counterclaim certainly you have a right to call evidence to support it.

Mr. Gilbride: Can I have a further date assigned for that?

The Court: No. Go ahead now. Start right in.

Mr. Gilbride: The defendant rests.

The Court: All right.

PLAINTIFFS' REBUTTAL EVIDENCE

BENJAMIN H. HELLMAN, recalled.

By Mr. Booth:

Q. Mr. Hellman, you have been sworn.

A. Yes.

Q. I show you a policy of the Metropolitan Life Insurance Company. Will you give me the number of it and the name of the insured?

A. This is Metropolitan Life Insurance Company policy number 6641296. The name of the insured is Harry J. Alker, Jr. The face of the policy is $50,000.

Q. Will you look at the back of that and tell me what was the condition of that policy, who were the beneficiaries or the assignee at the time that Mamie DuBan died?

A. The beneficiary of the policy is this: To the insured if living on the first day of November, 1969, or to Ralph Alker, brother, and Mary L. Corson, sister, in equal shares. An endorsement on the policy states that the right to change the beneficiary is reserved.

Q. Was there any assignment of that policy?

A. There is an assignment of the policy attached to it. For value received I hereby assign the policy issued by the Metropolitan Life Insurance Company of New York on the life of myself, Harry Alker, with all the proceeds thereof—and I am skipping some words—unto Alfred A. DuBan, address, 8th Floor, Land Title Building, Philadelphia. And it is dated February 24, 1933. Signed by Harry J. Alker and witnessed.

There is an additional assignment on the back of the policy from Mr. Alker to Alfred A. DuBan, 835 Land Title Building, Philadelphia; relationship to insured—and typed in there is creditor—and to his executors, administrators, successors and assigns. Signed by Harry J. Alker and dated June 8, 1936.

Q. Mr. Hellman, when did you first see that policy?

A. Shortly after the death of Mr. DuBan.

Q. Do you mean Mrs. DuBan?

A. Of Mrs. DuBan. I was in the apartment with the consent of Mrs. Dunwoody, the co-executrix, whom I represent. And among the effects in that apartment in Mrs. Dunwoody's bedroom and elsewhere, going through the drawers of wardrobes and chiffoniers and bureaus, I found this policy just as you see it here. And I also found another paper.

Q. Is this the other paper that you refer to?

A. Yes. I found this stock certificate assignment signed by Harry J. Alker covering 125 shares of the common stock of Mrs. Smith Pie Company. No name of the assignee. It was merely signed in blank, undated, by Mr. Harry J. Alker. This paper I found in the same way I found the policy. And this assignment and the policy and the other papers, the letters and the receipts for the 4400 shares of National Dairy Products Company stock, I delivered them all to either Mr. Cleaves or Mr. Mainwaring of the Girard Trust Company, co-executor of the estate of Mamie DuBan, deceased.

Mr. Gilbride: Let that second certificate there or statement or assignment be recorded as having no date on it. Am I correct?

Mr. Booth: Well, I will offer the both of them in evidence, the policy and the transfer.

(Court adjourned from 3 p.m. until 10 a.m., Thursday, April 26, 1956, at which time it reconvened.)

Mr. Gilbride: If your Honor please, I believe Mr. Booth will stipulate with me that the value of the National Dairy stock, the 1925 shares, on the date that the Federal Discount Corporation took it

over on January 20, 1943, was $15.75 a share, for a total of $30,318.75.

Mr. Booth: I will agree that the stock of the National Dairy Products on January 20, 1943, was $15.75. But I am bound to object to the relevancy of this because I don't think the value in 1943 is the measure of damage here. If this man is liable at all, then he is liable as of the date the demand was made on him for the return of the stock.

The Court: Well, then you are not agreed.

Mr. Booth: I agree to this; that the market quotation in 1943, on January 20, 1943, was $15.75 a share. But I must follow that by saying that that to my mind is not the measure of damage in this case.

The Court: Well, what do you suggest?

Mr. Booth: I object to the relevancy of it.

The Court: What is that?

Mr. Booth: I object to the relevancy of any valuation being put on this stock as of January 20, 1943.

The Court: What is the basis that you suggest?

Mr. Booth: My basis is that the market value we are to use as the measuring stick is March 8, 1954, the date when we demanded the return of the stock and at which time he failed to return the stock.

The Court: Well, are you sure that that is the right date?

Mr. Booth: Yes, sir.

Mr. Gilbride: Well, my only point at this time, if your Honor please, is to save the time of putting a witness on to prove the value of the stock on January 20, 1943. Whether or not it is relevant or

whether or not it would be the measure of damages will be for the law to decide.

The Court: I think your value of the stock probably is the value today. Why should it be anything else?

Mr. Booth: Well, under the cases, sir, the value seems to be the date the demand was made and the failure to comply with the demand to return it, and interest on the value of the stock until the time the judgment was paid.

The Court: It seems to me that ought not to be the law. If property is detained from a person, that person ought not to take anything less than the market value today. It seems to me it is not their fault that they haven't had possession of it and it is not their fault that they couldn't get the value of it at any given time. I think they have a choice of values, whichever one is higher.

Mr. Booth. We have elected, sir, in this case, to take it as of March 8, 1954, when he failed to comply with our demand, plus interest.

The Court: What?

Mr. Booth: Plus interest on the value of the stock from March 8, '54.

The Court: If that is a satisfactory measure to you, your side has a right to exercise the choice.

Mr. Booth: If I can recover that amount of money I will be perfectly satisfied. We all will be.

Mr. Gilbride: Well, Mr. Booth, will you agree with this statement which I am making; that the stock, the 1925 shares of stock on January 20, 1943 was valued at $15.75 a share? That is all I am saying.

Mr. Booth: Well, I say this: That I have no dispute with the fact that the market quotation of

that stock on January 20, 1943 was $15.75 a share.

Mr. Gilbride: Thank you.

Mr. Booth: But I still must say that I object to it upon the ground that it is irrelevant.

Mr. Gilbride: I got your point.

The Court: Well, I haven't got anything clear yet as to what you mean. It seems to me the plaintiff can take an election as to which date he will use under the circumstances.

Mr. Booth: We have elected in our pleadings, and I don't think we can go back on them, to take the value of this stock as of March 8, 1954, when he failed to comply with our demand to return it.

The Court: The market value as of 1954?

Mr. Booth: March 8, 1954. And we have a stipulation—

The Court: What is the value as of that date?

Mr. Booth: I will give you that in a minute. I think this is already in the record, sir. $126,087.50.

The Court: That is $126,087.50.

Mr. Booth: Yes. That was on the basis of $65.50 a share as of March 8, 1954.

The Court: All right, we have that.

Mr. Booth: Now we are also claiming interest on that amount of money from March 8, 1954.

The Court: That interest has not been calculated?

Mr. Booth: I have a statement here.

The Court: Is that date satisfactory with you?

Mr. Gilbride: No, we don't agree with that date.

The Court: All right, we will hear you on the subject. What date do you fix?

Mr. Gilbride: I take the date as of the time that the Federal Discount Corporation took over the stock, which was January 20, 1943.

The Court: Who are they? How do they get in the case?

Mr. Gilbride: The Federal Deposit—you see, what happened in this case, the stock which was borrowed from DuBan was pledged as security—in our pleadings here we state that Mr. Alker had a loan with the Integrity Trust. The Integrity Trust was taken over by the Federal agency. At the same time the loan was taken over by the Federal agency they took over this collateral. And after a certain length of time with the explanations set forth in Mr. Alker's pleadings, the stock was taken over in default of the loan. Then we had this terrible situation which arose afterwards, that the stock was not being returned.

The Court: Well, that is complicated. It seems to me it either would be the date of March 8, 1954 or it could be the value of that stock today.

Mr. Gilbride: My position is that it is the value at the date—

The Court: Well, that is your position, but I can't understand why it should be that way. I could see no reason for that.

Mr. Gilbride: Well, will your Honor permit me to submit a short brief or a memorandum on the question of damages?

The Court: Certainly.

Mr. Gilbride: Very good.

The Court: I am willing to study it, but I don't see how there could be any doubt about it.

Mr. Booth: Now there is one other stipulation we have here, and that is a stipulation that it is

agreed that the National Dairy Products Corporation declared and paid on December 10, 1953, a dividend of seventy-five cents a share.

Mr. Gilbride: Yes.

Mr. Booth: That dividend amounted to $1,443.75. That was not paid to the decedent. Of course, she was dead at that time. It was never paid to her estate.

The Court: I understand that. What is the total of that dividend?

Mr. Booth: The total of that dividend is $1,443.75.

The Court: And you ask for that in addition to the $126,087.50?

Mr. Booth: Yes, that's right, sir. And with interest on those items to date.

The Court: Have you calculated the interest on that?

Mr. Booth: We have calculated the interest until today on the $126,087.50. The interest is $16,139.20. And the interest on the dividend withheld or which was not paid to us would be $205.97. That makes our total claim as of this date $143,876.42.

Mr. Gilbride: I haven't seen your calculation.

Mr. Booth: Here it is. You can check it.

The Court: All right. Well, we have that down.

BENJAMIN H. HELLMAN, recalled.

CROSS-EXAMINATION.

By Mr. Gilbride:

Q. Mr. Helman, Mrs. DuBan died November 8, 1953. Was that the date?

A. I think that was near enough to the date. That was approximately the date.

Q. When did you go to her apartment, what date?

A. I have some notes there that I could refresh myself with.

Q. All right.

A. I have a note here that I made on December 7, 1953, and it states that on Saturday, December 5 I spent two hours at Mrs. Dunwoody's—

Q. I can't hear you.

A. On Saturday, December 5 I spent two hours at Mrs. Dunwoody's—that is at Mrs. DuBan's apartment. She was still living there. I was going over letters and papers in the estate of Mamie DuBan, deceased.

Sunday, December 6, I spent four hours classifying various correspondence, principally from Mr. Alker, and copies of letters sent by Miss Loevner to Mr. Alker and others.

Monday, December 7, I spent one hour at the Girard Trust Company delivering—that has nothing to do with it.

That is about the time, sir, that I was at the apartment looking over various papers belonging to Mamie DuBan.

Q. Had letters testamentary been granted before that date of December 5?

A. I couldn't answer that. I hardly think so, but I am not sure. Possibly. I don't know.

Q. Among the papers in Mrs. DuBan's apartment did you see any list of any assets or papers or documents taken from the safe box? Was there any list?

A. No.

Q. There was none?

A. No list. I found things in a rather profuse confusion; papers stuck in drawers and apparently no order or no arrangement to things that were in the drawers.

Q. Well, in the due course of your representation of the executrix did you go to the bank to get the contents of the safe box?

A. Yes, I did.

Mr. Gilbride: May I have a minute, if your Honor please?

The Court: Yes.

The Witness: Apparently I have no note of it that I can put my hand on quickly, but there are receipts that Mr. Cleaves gave us when we were at the box—myself, Mr. Cleaves or Mr. Mainwaring, or both of them—certainly Mr. Cleaves—Mr. Booth, Mrs. Dunwoody. And the contents of the box were noted on a receipt which is in Mr. Booth's possession signed by Mr. Cleaves.

By Mr. Gilbride:

Q. I show you this schedule.

A. Yes.

Q. Is that the list?.

A. That is not the complete list. I think there is also a list covering certain jewelry that was in the box.

Mr. Gilbride: Will you hand that up to Judge MacNeille, please?

The Court: Well, what has this to do with the case? You will have to explain that to me. I understood that what we are trying is the matter of this stock.

Mr. Gilbride: Yes. But throughout the defendant's case—

The Court: What are these things, savings bonds and so forth?

Mr. Gilbride: Throughout the defendant's case it was part of the evidence from all of these witnesses who testified to conversations with Mrs.

DuBan that she was going to return the insurance policy and the Mrs. Pie stock when she went to her safe box. And this document here will show that November 18, 1953—what is the date on this?

The Court: That is the date.

Mr. Gilbride: Yes. That the Mrs. Pie stock was in the box and it is marked--

Mr. Booth: It also shows that the life insurance policy was not in the safe deposit box.

Mr. Gilbride: Yes, that's right. And it also shows that the National Dairy Stock was in the box.

The Witness: May I make a notation please on that? May I make an observation to that please?

Mr. Gilbride: Well, go ahead.

The Witness: The Smith Pie stock was in the box but the assignment was not in the box but was at Mamie DuBan's apartment.

Mr. Gilbride: We only want the truth here, the real situation. Now you will see, if your Honor please, at the bottom of that list—

The Court: 125 shares. And it is marked Mrs. Smith Pie Company, common, no par, registered in Harry J. Alker, Jr. That is what is says.

Mr. Gilbride: Does it have a notation for the purpose for which it is in the box?

The Court: Not that I can find. I will pass it over and see if you can find it.

Mr. Booth: Mrs. DuBan didn't write it. The bank wrote that.

Mr. Gilbride: May we introduce this into evidence?

The Court: We will find out whether it is worth while first. The second from the bottom

would just be 125 shares, Mrs. Smith's Pie Company, common no par. The line above that is the following, for safe keeping only, 125 shares Mrs. Smith's Pie Company, common no par, registered in Harry J. Alker, Jr.

Mr. Gilbride: Very good.

The Court: What?

Mr. Gilbride: Thank you. That was my point.

The Court: Well, what is the point about that?

Mr. Gilbride: The point is that this Mrs. Smith Pie stock was in the box and it was marked for safe keeping.

Mr. Booth: Oh, no.

Mr. Gilbride: The witnesses testified to the best of their knowledge the Mrs. Pie stock was in the safe box of Mrs. DuBan, and one of the reasons that it hadn't been returned to Mr. Alker, as being part of the collateral for this loan, was that she had it in a box. Then your Honor had evidence of her age and her infirmity and this corroborates the testimony of the defendant's witnesses giving explanation to why this stock hadn't been returned if she had such an intent.

The Court: Did she ever make any assignment of that stock to Mr. Alker?

Mr. Booth: Yes, she did. We have it here in the record. We have offered the assignment in evidence here, a blank assignment executed by Alker, which was found not in the safe deposit box but, as Mr. Hellman testified, in Mrs. DuBan's apartment after she died. That assignment is in the record.

The Court: Well, if you want this in evidence I don't see any objection to its being in there. We can consider it.

Mr. Booth: Of course, it is understood, Mr. Gilbride: that whatever notation may be on there as to for safe keeping only, is only a notation put on there by the representative of the Girard Trust Company and not by Mrs. DuBan.

Mr. Gilbride: Well, may I ask you a question here? You went to the box. As a member of the Bar, was that stock set off and identified with the wording for safe keeping or anything?

Mr. Booth: No.

Mr. Gilbride: Where did the bank get such a phrase to use?

Mr. Booth: That was their own phrase because at that time they had no transfer. There was no transfer attached to the stock certificate. The transfer was found at the house.

Mr. Gilbride: All right.

Mr. Booth: The assignment.

Mr. Gilbride: Your Honor will note that it is the Mrs. Pie stock we are now talking about that was in the safe deposit box on November 18, 1953.

Mr. Booth: We admit that the certificate was there. I will show you the certificate if you want to see it.

Mr. Gilbride: No. That is enough.

Mr. Booth: But I do want to call your attention to the fact that the assignment of that stock signed by Mr. Alker was in the home of Mrs. Mamie DuBan in the Cambridge.

Mr. Gilbride: The witness, Mr. Hellman, has testified to that. That's right.

The Court: All right. What do you want to do with these? Do you want to offer these in evidence?

Mr. Gilbride: Yes, please.

Mr. Booth: I object to that. This is only a list of what was found in the safe deposit box of all the assets of this woman's estate that was in there. I don't see that it has anything to do with this case.

Mr. Gilbride: It is for the purpose of showing that this pie stock was in the safe box on November 18, 1954.

Mr. Booth: I will admit that. I will admit the certificate was in there.

Mr. Gilbride: Very good.

The Court: All right, sir.

Mr. Booth: Then we don't have to clutter up the record. Are you withdrawing your offer?

Mr. Gilbride: Yes.

FLORENCE DUNWOODY, sworn.

By the Court:

Q. Mrs. Dunwoody, what is your address?
A. 2154 Cheltenham Avenue.

By Mr. Booth:

Q. Mrs. Dunwoody, how old are you?
A. I am seventy-four.
Q. And you are a sister of Mrs. Mamie DuBan?
A. I am, yes.
Q. And she died in November of 1953?
A. That's right.
Q. At the time of her death she was living in the Cambridge Apartments?
A. Yes.
Q. Can you tell me who was living there with her?
A. Well, I had been living with her for ten years. And then we had a maid, too.

Q. And you three women lived there together?

A. Yes, we did.

Q. Did you ever see in that apartment—let me ask you this. Were you and Mrs. DuBan constantly together?

A. Yes, we were.

Q. If you went out did each of you go along or how did you work it?

A. Well, up until the time that sister was ill, why, we always went together. During the last year she wasn't very well and was unable to go out.

Q. But you and she were there pretty much all the time together?

A. All the time, yes.

Q. When you went out how did you go, in an automobile or a taxicab or how did you go?

A. Well, sometimes I would walk. It was always errands that I had to do. I was there as a companion to sister. And when the maid went out I prepared the meals and took over, which was twice a week, you know.

Q. Now this Mr. Rhoads, you heard him testify here yesterday?

A. Yes.

Q. I ask you did you ever see him in Mrs. DuBan's apartment?

A. I never saw Mr. Rhoads before in my life.

Q. He testified that he came there early in the morning around nine o'clock and he found the door ajar and so walked in. Now tell me what was the habit of you and Mrs. DuBan as to keeping the door? How did you keep the door, unlocked or locked, or how did you keep it?

A. That door was securely locked. I know. I did it myself. And sister and I were very cautious about that. That door was never left open.

Q. What lock did you have on it?

A. Well, we had two mortise locks and a chain besides.

Q. Now, Mr. Hookey, did you ever see him in the apartment?

A. Oh, yes. I have seen Mr. Hookey quite a number of different times.

Q. What happened, if anything, when you saw him there in the apartment? What was he doing there?

A. Well, he had brought up papers to be signed for my sister to sign them from Mr. Alker's office.

Q. Did your sister sign them?

A. She signed them. And I stood right there with her because sister's eyesight was very poor. And in writing, her letters would become congested. And I always held my hand this way and she would follow with her signature on the dotted line.

Q. When these papers were signed did Mr. Hookey then take the papers and leave?

A. Why, Mr. Hookey wasn't in that apartment any more than about ten minutes altogether. It was simply signing the papers. And sister asked him how Mr. Alker was. And he left.

Q. Did you ever hear any discussion or any statements made by Mrs. DuBan to Mr. Hookey or anyone as to any business relations that she had with Mr. Alker?

A. I never heard anything. And my sister was very confidential to me. She would tell me things. But I never heard anything in reference to stock or anything.

Q. Do you mean to say she never even discussed such matters with you?

A. She would tell me about different things but she never said that she was going to turn any stock over or anything. She made me the executrix of her will. And I carried out her plans, her requests, to the best of my ability.

Q. Did you know an Elva Bruce?

A. I never met Elva Bruce until the night that my sister was laid out and she was there at the viewing. I never saw Elva Bruce in the apartment.

Q. You never saw her in the apartment?

A. No.

Q. It has been testified, I believe, that Mrs. DuBan made her a payment every month.

A. Yes.

Q. To help her along.

A. Yes. It was, I believe, a payment of $25 a month.

Q. Was that continued right down to the time—

A. That was continued, although my sister told me many times that she felt like discontinuing that allowance, for Elva Bruce never wrote to her and thanked her, and if it wasn't and hadn't been for cancelled checks she wouldn't have known whether she ever received the money or not.

Q. Miss Marion Alker testified, and you heard her?

A. Yes.

Q. She testified that she was in Mrs. DuBan's apartment to see Mrs. DuBan on a number of occasions and particularly in August or, I think it was, in August of '53. Do you remember the occasion of her being there that summer of '53?

A. I do remember Miss Alker being there and it was during the hot weather. But I am not quite sure as to the time. And I talked to Miss Alker. I remember very plainly I had a cold and I would go in my back room. I was taking medication for it. And I would come out and sit down on the sofa. And I talked to Miss Alker and our conversation was general.

Q. What was she there for, to get papers signed you say?

A. Yes. It was a paper that had to be signed. They wanted to get it in Norristown that evening. It was rather urgent. And I was right there with my sister.

Q. When she signed the paper?

A. When she signed it. I was there at all times.

Q. At that time was there any discussion between Miss Alker and your sister as to any financial transactions between your sister and Mr. Alker?

A. I never heard any, never did.

Q. Now Miss Alker was there on other occasions, wasn't she?

A. Well, she may have been, but my mind is not clear about that and I wouldn't want to say. I am not sure.

Q. Now, Mrs. Dunwoody, was Mrs. DuBan able to move around and go places?

A. Well, up until about the last year of her life she got along very nicely. We went out together. We went in the Yellow Cab. Any errands she had I was always with her.

Q. Did you and she go to bank together?

A. Yes, we went to bank every time. Every time she wanted to go to bank I went with her.

Q. Where was the bank?

A. Well, that was the Philadelphia Saving Fund, Broad and Ruscomb, Logan.

Q. Is that where she had her safe deposit box?

A. Yes, she did.

Q. And would you and she go to the safe deposit box together?

A. That is correct, yes.

Q. How often would you say she went?

A. Well, I would say she probably went on an average of once a month.

Q. And she continued to do that up until you say a year prior to her death?

A. Well, maybe a year, yes.

CROSS-EXAMINATION.

By Mr. Gilbride:

Q. Mrs. Dunwoody, when did your sister's eyesight fail her?

A. Sister had trouble with her eyesight—

Q. When did it fail her and she required somebody to read to her?

A. Well, at least two years before her death.

Q. You were constantly with her physically?

A. I was.

Q. Did you occupy the same bedroom or a separate bedroom?

A. A separate bedroom.

Q. And isn't it a fact that most of your time was spent in your own bedroom separate and apart from the apartment premises?

A. That is ridiculous. I was all through that apartment. I was one of the apartment. That was my home. I didn't stay in one room longer than I stayed in another.

Q. Did you live there when Mr. DuBan was living there?

A. No, I did not.

Q. How long after his death did you come?

A. Well, I was there the last ten years. Mr. DuBan has been dead, I believe, seventeen.

Q. You remember Miss Alker coming?

A. I do.

Q. On all the occasions that she would be there would you come out and greet her and be in the conversation?

A. Well, I remember—

Q. Answer the question. Would there be times when you didn't come out?

A. I never remember Miss Alker being there unless I came out.

Q. Were you with your sister when she died?

A. Of course I was. The Sunday morning I called the doctor. I told him my sister had taken a change and would he come immediately, which he did.

Q. And you say that you were the constant companion and associate of your sister?

A. I was.

Q. During the last two years?

Mr. Booth: She said for ten years.

Mr. Gilbride: Well, I mean she was physically beside her for two years when her eyesight failed. That was my question.

By Mr. Gilbride:

Q. You were there for ten years but the last two years were constant?

A. Yes.

Mr. Booth: She said she was there constantly with her for ten years.

The Witness: Ten years.

Mr. Gilbride: All right, put it that way.

By Mr. Gilbride:

Q. Now then you say you never remember Mr. Rhoads being there?

A. I never saw Mr. Rhoads in the ten years that I was there. I never heard his name mentioned.

Q. But you did remember Mr. Hookey?

A. Oh, yes. I would open the door for Mr. Hookey. It was always locked. And, of course, the bell would ring and I would open the door.

Q. Well, would you always be in the living room?

A. Well, I could hear the bell in the back.

Q. What time did your sister rise in the morning?

A. Well, sister was up in the morning between seven and half past seven.

Q. What time would you get up?

A. The same time.

Q. Were there any occasions when the maid answered the door or were you the only one who ever answered that door?

A. No. The maid would answer the door. But, of

course, the maid was out two days a week. And, of course, I would answer it.

Q. Did you ever take any days when you left the apartment by yourself?

A. No specified time, no.

Q. Well, did you ever go out?

A. I went to the store. I went out different hours. But I never stayed away all night.

Q. So that you weren't there every minute. You were away at times?

A. Yes.

Q. How often would you be away besides shopping?

A. Once in a while maybe in a month I would go up to see my daughter in Glenside.

Q. How long would you stay?

A. A couple of hours.

Q. Would that be morning or evening?

A. That was usually, well, around eleven o'clock until two in the afternoon.

Q. Eleven until two?

A. And when I came home I would ask sister how she was and did anybody call.

Q. You were the confidant of your sister?

A. I was.

Q. She confided in you with everything?

A. She confided in me. And many times she asked my advise on different matters.

Q. Was she with you on November 18 when you went to the safe box? Did you go to the safe box on November 18, 1953, just before her death?

Mr. Booth: When? November what?

Mr. Gilbride: Eighteen.

Mr. Booth: She was dead on November 18.

By Mr. Gilbride:

Q. Did you go to the box on November 18, 1953?

Mr. Booth: Wait a minute. With Mrs. DuBan?

Mr. Gilbride: What?

Mr. Booth: You mean with Mrs. DuBan?

Mr. Gilbride: No. I am just asking her did she go.

By Mr. Gilbride:

Q. Were you there present when the contents of the box were taken out?

A. With Mr. Hellman. And I was there.

Q. Was that the first time you knew that you were the executrix?

A. Oh, no. I had known that I would be an executrix of the estate for a long time. My sister used to say to me, Florence, I don't know what I would have ever done without you. You are going to be my executrix.

Q. And you were constantly with your sister during the last two years?

A. Yes.

Mr. Booth: What do you mean, the last two years? She said ten years.

Mr. Gilbride: I know ten years. But I am saying when this woman's eyesight failed. I want to put on another witness on this particular part of the testimony. I admit she lived there for ten years.

Mr. Booth: All right.

Mr. Gilbride: This is cross examination.

By the Court:

Q. Mrs. Dunwoody, you are a widow?

A. Yes, your Honor.

Q. What was your husband's name?

A. My husband's name was John Dunwoody.

LENA LOEVNER, recalled.

By Mr. Booth:

Q. Miss Loevner, you have been sworn.

A. Yes, sir.

Q. I show you a letter on the stationery of Harry J. Alker, addressed to Miss Lena Loevner and dated July 19, 1947, and ask you whose signature that is?

A. Mr. Alker's.

Q. Will you read that letter to the Court?

A. Dear Miss Loevner: The insurance company advised me that the cancellation value of Mrs. DuBan's policy as of July 25 is $18,579.17. The loan against the same is $7,000. They are charging me six per cent interest on that loan. I could transfer that loan to a trust company on the policy at three per cent. Do you suppose that Mrs. Duban would consent to this? I would have to borrow the policy in order to do it. It would save me over $200 a year. Sincerely yours, Harry J. Alker.

Q. After you got that letter did you ever send that insurance policy?

A. No.

Q. Did you ever get hold of it?

A. No.

Q. So the letter then went ignored?

A. Yes.

Q. Now I show you another letter on the stationery of Harry J. Alker, dated August 12, 1949, addressed to Mrs. Alfred A. DuBan, and ask you whose signature is on that letter?

A. Mr. Alker's.

Q. Will you read that to us?

A. Dear Mrs. DuBan: I am changing the time of payment of the premiums on the policy held by you from monthly to quarterly, and have paid them up to October. In order to change the time of payment the

insurance company requires you to sign where I have put your initials. I save a little bit in premiums by making it payable this way. Return the enclosed to me. Very truly yours."

Q. Do you know whether the paper that he refers to in this letter was sent to him?

A. Well, I imagine it was.

Mr. Gilbride: Wait a minute.

The Court: What is it?

Mr. Booth: I asked the witness if she knew whether the paper referred to in this letter of August 12, 1948, as to changing the dates of payments of premiums, was signed and sent to Mr. Alker. And she said she imagined it was.

Mr. Gilbride: I don't know what purpose it would serve. This letter which you are now going to introduce in evidence, that is Mr. Alker's signature; is that right?

Mr. Booth: Yes.

Mr. Gilbride: Let it speak for itself.

Mr. Booth: All right. If you don't want it, I don't care. I will offer these two letters in evidence.

By Mr. Booth:

Q. Miss Loevner, did you at any time go with Mrs. DuBan to her safe deposit box?

A. Very often.

Q. Where was it?

A. Broad and Ruscomb.

Q. Is Broad and Ruscomb in Philadelphia?

A. Yes.

Q. Who went with you?

A. Mrs. Dunwoody.

Q. And Mrs. DuBan?

A. Yes.

Q. How frequently would you go?

A. Well, she had treasury bonds and we had to clip the coupons. And that is all I went for, to cut the coupons.

Q. You clipped the coupons for her?

A. Every six months.

Q. Every six months?

A. I would say that. Maybe some other time for some check or something.

Q. When did she cease going to her safe deposit box?

A. I would say about a year before, because when she was confined to the room—about a year before.

Q. About a year before?

A. Yes.

Q. Before her death?

A. Before her death.

Cross-Examination.

By Mr. Gilbride:

Q. Mrs. Dunwoody was with you, you say?

A. Yes. As I recall, she was always with us.

Mr. Booth: I have offered those letters in evidence.

FREDERICK J. MAINWARING, sworn.

By Mr. Booth:

Q. Mr. Mainwaring, you are a trust officer of the Girard Trust Corn Exchange Bank?

A. That is correct.

Q. And you were acting there in that capacity on November 18, 1953?

A. No. In 1953 I was an assistant trust officer.

Q. Were you assigned the estate of Mamie DuBan to administer that estate?

A. That is true.

Q. Did you on November 18, 1953, go to the safe deposit box of Mamie DuBan at the Philadelphia Saving Fund?

A. That is true.

Q. What office?

A. I think it is their Logan office. It is at Broad and Ruscomb anyway.

Q. Do you have a list of the contents of the box with you?

A. No, I do not.

Q. Will you look at that and see if that is the list which you made up at the time, a copy of it?

A. Yes, it is.

Q. And that is your signature on it?

A. That is my signature.

Q. Will you examine that list and tell me whether you found in that box any policy on the life of Harry Alker in the Metropolitan Life Insurance Company?

A. No.

Q. Or any other company?

A. We did not.

Q. It was not in the box?

A. No, it was not.

Q. That Mrs. Smith Pie stock that they referred to, was that certificate in the box?

A. Yes, it was. It is noted here on the list.

Q. Do you have that certificate with you?

A. It is in my brief case.

Q. You have it?

A. Yes.

Q. But there was no assignment of that stock in the safe deposit—

Mr. Gilbride: Don't lead him so much.

By Mr. Booth:

Q. Was there any assignment of that certificate?

A. No, I do not believe there was any assignment of the stock in the box.

Q. Do you have the policy with you?

A. It is in my brief case, sir. I can get it. This is the policy.

Q. That is the $50,000 policy in the Metropolitan Company?

A. Metropolitan Life Insurance Company.

Q. You received that sometime after you were in the box, did you?

A. That is true.

Q. From whom?

A. Mr. Hellman.

Q. That notation on that receipt, for safe-keeping only, is that your notation?

A. Perhaps I should explain it.

Mr. Gilbride: Wait a minute. I am going to object to that. Let me ask him a few questions.

By Mr. Gilbride:

Q. Did you place it on there?

A. I did not physically type it on the list. The typist who was with us typed it.

Q. What?

A. The typist who made up the list typed the notation.

Q. Was it put on there under your supervision?

A. At my instructions.

Q. At your instructions why?

A. Because when we go into a safe deposit box we may find assets which clearly belong to a decedent and, if so, we would put them on the list in that manner. If there is something on the list which we are unable to determine as to who it might belong to, there might be a question, we would put for safe keeping only, because

we felt we were only holding temporarily until we were able to determine who might own it. We would do that with a watch we could not determine the ownership of or any other item because we felt we were in the position perhaps of a custodian until such time as ownership could be determined.

Q. That is what you did in this case?

A. That's right.

Mr. Gilbride: If your Honor please, this schedule here of the contents of the box has been referred to by Mr. Booth and the other witnesses at least two or three times. Why isn't it offered in evidence?

Mr. Booth: I have no objection to it being offered in evidence.

Mr. Gilbride: May the list of the contents of the box be offered into evidence?

The Court: There seems to be no objection.

Mr. Gilbride: I offer it in evidence.

DEFENDANT'S SURREBUTTAL EVIDENCE.

MARION ALKER, recalled.

Mr. Booth: Let me ask you what you intend to prove by this witness.

Mr. Gilbride: This witness is in rebuttal to the testimony of Mrs. Dunwoody who testified that she was constantly in physical and personal attendance with her sister the last two years, to say nothing of the ten years that she lived with her. That is the offer of proof at this time to rebut the testimony of Mrs. Dunwoody.

By Mr. Gilbride:

Q. Miss Alker, Mrs. Dunwoody testified that at least during the last two years, to say nothing of the ten years that she lived there, she was in constant physical association and attendance on her sister whose eyesight had failed the last year of her life. Do you know anything of that?

A. Well, all I know is that when I went there the last day Mrs. DuBan sat in the corner and she seemed—well, she seemed just the same. She seemed just the same to me, only she wasn't all greased up like she usually was. And I was there quite a long time before Mrs. Dunwoody came out. She puts on an act that she is very delicate, but I don't think she is as delicate as I am.

By the Court:

Q. You were very friendly to her, though, weren't you?

A. To Mrs. Dunwoody? No. I don't think anybody is.

Mr. Gilbride: You just answer my questions.

The Witness: All right. I am answering it. And when I was there I wanted her to sign this paper. And she said that she had just put drops in her eyes. Well, I said, Mrs. DuBan, I will read it to you. And, well, she hemmed and hawed.

By the Court:

Q. Let me get this straight. You are talking now about Mrs. DuBan?

A. This is Mrs. DuBan.

Q. But before you were talking about Mrs. Dunwoody?

A. Well, I am starting at the beginning when I went in. Mrs. DuBan was sitting in the corner and seemed very bright. All the windows were down and it was a red hot day.

By Mr. Gilbride:

Q. When? Will you set the time?

A. Well, I told you it was—well, it was an awfully hot day. It must have been in August when we had the awful hot dog days.

Q. In the same year she died?

A. That's right. She died in November. Because I couldn't get over that she was dead. She died alone. Nobody was with her when she died.

Mr. Booth: I move that that be stricken out.

The Court: Yes. We are wandering away from the issue.

The Witness: I am telling you she looked all right to me. She looked really in better health than Mr. Booth. Well, that is the truth. When the electrician came in with a fan she got up. Mrs. Dunwoody was there when she got up. Why, she got up just fine. But she had a cane. And she made a big fuss over this little electrician. I don't know who he was. She introduced me to him. And she made

quite a fuss. Mrs. Dunwoody was calling for a cab for me to go home. She didn't act like anybody ready to die.

By Mr. Gilbride:

Q. My question was in these last two years when you would go to visit or go up to the apartment was Mrs. Dunwoody there?

A. Never saw Mrs. Dunwoody but once. Mr. DuBan wouldn't have her in the house.

The Court: Well, you had better—

Mr. Gilbride: I can't get a responsive answer.

By Mr. Gilbride:

Q. During the last two years how many times did you go to the apartment?

A. I told you I was sick. I really shouldn't have gone that day because I was having ear trouble and I wasn't supposed to ride in an automobile or a train. I very seldom went any place except I would go to the Quaker lady where Judge MacNeille went. And I couldn't hear anything.

Q. Let me ask you now for the last time—

A. Because I had a streptococcus infection. I had mastoids.

Q. Miss Alker, won't you listen, please?

A. Yes.

Q. My question is during the last two years when you visited the apartment was Mrs. Dunwoody there?

A. I never saw Mrs. Dunwoody but once. I heard a lot about her.

Q. Then do you know of your own knowledge if Mrs. Dunwoody was in attendance on her sister at the time of her death?

Mr. Booth: Wait a minute.

Mr. Gilbride: I asked her if she knows.

Mr. Booth: Let us find out how often she was there.

By Mr. Booth:

Q. How often were you in this apartment?

A. What did you say?

Q. How often were you in Mrs. DuBan's apartment?

A. How long was I in it?

Q. How often?

A. Oh, well, I was in it often.

Q. What?

A. Often.

Q. How many times a month?

A. Oh, how could I tell? I don't know.

By The Court:

Q. Well, once or would you say a hundred times?

A. A hundred times.

By Mr. Booth:

Q. In a month?

A. In a month?

Q. Yes. Or in a year?

A. Are you crazy? Why, she lived away out there. I would have to go in a train and everything else. I don't have an automobile.

Q. You weren't there very frequently, were you, except you went there to get a paper signed?

A. No. I was there in a friendly way. I never went with a paper but once, that is all.

Q. The other times you were just on a social call?

A. All a social call. I am not in the habit—

Q. Now let us try to get down to it. How often were you there?

A. Well, I can't tell you that.

Mr. Booth: Well, then I object to the question.

The Witness: That is out. I just can't tell you.

The Court: All right. Is there anything else, gentlemen?

Mr. Gilbride: I can't do anything with her.

Mr. Gilbride: In view of the testimony of Mrs. Dunwoody I renew my motion and the offer of the depositions of Mr. Alker into evidence.

Mr. Booth: You offered them and they were refused.

Mr. Gilbride: In view of the testimony of Mrs. Dunwoody I now make the same offer, to have the depositions of Mr. Alker introduced into the record.

Mr. Booth: I still object to it, your Honor.

The Court: I will sustain the objection and overrule the offer.

Mr. Gilbride: Exception.

Mr. Booth: I think that is the case, sir. Both sides have closed.

Chartered 1836

GIRARD TRUST CORN EXCHANGE BANK

PHILADELPHIA 2, PA.

February 24, 1954

Harry J. Alker, Jr. Esq.
Land Title Building
Broad and Chestnut Streets
Philadelphia 10, Pa.

Dear Sir:

The Girard Trust Corn Exchange Bank and Mrs. Florence Fisher Dunwoody are Executors under the Will of Mamie DuBan, who died November 8, 1953, and a short certificate of their appointment is hereto attached.

At the time of her decease you were under obligation to deliver to Mrs. DuBan upon demand 1,925 shares of common stock of the National Dairy Products Corporation and demand is now made upon you for delivery to the Executors of certificates for this number of shares and the payment to them of $1,443.75 being a sum equivalent to a dividend of seventy-five cents per share on 1,925 shares, the National Dairy Products Corporation having on or about December 10, 1953, declared and paid a dividend of seventy-five cents per share on its common stock issued and outstanding.

Unless certificates for the number of shares mentioned be delivered to the Executors and the sum of $1,443.75 paid to them on or before March 8, 1954, the Executors will be obliged, in the performance of their duty, to institute proceedings against you and it is hoped that you will make this unnecessary by complying with the demand now made upon you.

As you know, Mrs. DuBan held and her Executors now hold as collateral to secure your obligation an assignment of policy No. 6 641 296 A of the Metropolitan Life Insurance Company, insuring the life of Harry J. Alker, Jr., with an assignment thereof, and a certificate for 125 shares of Mrs. Smith's Pie Baking Company, with an assignment thereof, and upon compliance by you with the demand now being made, you will be entitled to the return of these collaterals, otherwise the Executors reserve the right to deal with the said collaterals in such manner as may be proper.

Very truly yours,

GIRARD TRUST CORN EXCHANGE BANK
BY

W. . Cleaves, Asst. Vice President

Florence Fisher Dunwoody
Florence Fisher Dunwoody
Executors under the Will of
Mamie DuBan, deceased.

Enclosure

Plaintiff's Exhibit

AD. 107

D-1

GIRARD TRUST CORN EXCHANGE BANK
TRUST DEPARTMENT
CUSTOMER'S RECEIPT—DUPLICATE

PHILADELPHIA. 11/18/53

ACCOUNT · Estate of Mamie DuBan, Dec'd.

CAPACITY· Girard Trust Corn Exchange Bank & Florence Fisher Dunwoody, Executors

RECEIVED OF Removed from decedent's Safe Deposit Box at the Phila. Saving Fund Society, Rumscomb St. Branch in the presence of Mrs. Florence Fisher Dunwoody, Benjamin H. Hellman, Esq. and Edwin Booth, Esq. ~~Represent~~ Representing Girard Trust Corn Exchange Bank, Mr. F.J. Mainwaring, Asst. Trust Office

BONDS

$10,000 U.S.A. Treasury Bonds 2 3/4% due 9/15/59-56
With opns due 3/15/53 & SCA

$40,000 U.S.A. Taxable Savings Bonds Series G
~~Treasury~~ Bonds 2 1/2% REG due 10/1/62
Reg n/o Mrs. Mamie Duban

THE FOLLOWING BONDS REG N/O MRS. MAMIE DU BAN.

$150 U.S.A. Taxable Savings Bonds Series E REG due 1/1/52

$25 U.S.A. Taxable Savings Bonds Series E REG due 4/1/52

$25 U.S.A. Taxable Savings Bonds Series E REG due 6/1/52

$50 U.S.A. Taxable Savings Bonds Series E REG due 7/1/52

$50 U.S.A. Taxable Savings Bonds Series E REG due 8/1/52

$50 U.S.A. Taxable Savings Bonds Series E REG due 6/1/53

$250 U.S.A. Taxable Savings Bonds Series E REG due 9/1/53

$300 U.S.A. Taxable Savings Bonds Series E REG due 2/1/54

$200 U.S.A. Taxable Savings Bonds Series E REG due 7/1/54

STOCKS ALL REG N/O (MRS.) MAMIE DU BAN

50 shs Chesapeake and Ohio Railway Company Common Par $25

12 shs Consolidated Natural Gas Company Capital Par $15

5 shs Delaware Power & Light Company Common Par $13.50

GIRARD TRUST CORN EXCHANGE BANK

BY _____ AUTHORIZED SIGNATURE

ENTRY NO. R 2491

Plaintiffs' Exhibits

268a

D-2

T. AD. 107

GIRARD TRUST CORN EXCHANGE BANK
TRUST DEPARTMENT
CUSTOMER'S RECEIPT—DUPLICATE

PHILADELPHIA, PAGE 2

ACCOUNT Est. of Mamie DuBan

CAPACITY Executors

RECEIVED OF STOCKS CONT'D

40 shs Freeport Sulphur Company Common Par $10
100 shs General Motors Corporation Common Par $5
200 shs May Department Stores Company Common Par $5
2 shs Mission Corporation Common Par $1
6,700 shs National Dairy Products Corporation Common No Par
33 shs Philadelphia Electric Company Common No Par
3 shs Pittston Company Common Par $1
250 shs Mrs. Smith's Pie Company Common No Par
650 shs Southwark Manufacturing Company Capital No Par
100 shs Texas Company Capital N Par $25
50 shs Underwood Corporation Common No Par
150 shs Union Carbide and Carbon Corporation Capital No Par
10 shs United Gas Improvement Company Capital Par $13.50

THE FOLLOWING FOR SAFEKEEPING ONLY

125 shs Mrs. Smith's Pie Company Common No Par
Reg n/o Harry J. Alker, Jr.

GIRARD TRUST CORN EXCHANGE BANK

BY _____ AUTHORIZED SIGNATURE

ENTRY NO. R 2492

Plaintiffs' Exhibits

269a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

August 12, 1948.

Mrs. Alfred A. DuBan
208 Cambridge Apartments
Wissahickon Avenue & School Lane
Philadelphia, Pennsylvania

Dear Mrs. Duban:

I am changing the time of payment of the premiums on the policy held by you from monthly to quarterly, and have paid them up to October. In order to change the time of payment, the insurance company requires you to sign where I have put your initials. I save a little bit in premiums by making it payable this way. Return the enclosed to me.

Very truly yours,

JLJ Alker

Plaintiffs' Exhibits

270a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER

HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING

PHILADELPHIA 10

July 19, 1947

Miss Lena Loevner
2032 Walnut Street
Philadelphia, Pennsylvania

Dear Miss Loevner:

The insurance company advised me that the cancellation value of Mrs. DuBan's policy as of July 25 is $18,579.17. The loan against the same is $7000.00. They are charging me 6% interest on that loan. I could transfer that loan to a trust company on the policy at 3%. Do you suppose Mrs. Duban would consent to this? I would have to borrow the policy in order to do it. It would save me over $200.00 a year.

Sincerely yours,

H J Alker

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
WILLIAM P. BEEBER
E. WARING WILSON
HARRY J. ALKER JR

ATTORNEYS AND COUNSELLORS AT LAW
1419 LAND TITLE BUILDING
PHILADELPHIA

October 10th, 1930.

Alfred A. DuBan, Esquire,
8th Floor, Land Title Building,
Philadelphia.

Dear Mr. DuBan:-

This will acknowledge the receipt by me from you of two hundred (200) shares of National Dairy Products Corporation Common stock, which stock I am to have the right to use with the Integrity Trust Company as collateral for my loan and which stock I am to return to you upon demand if not sooner.

I cannot tell you how much I appreciate your great kindness.

Sincerely yours,

H. J. Alker

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
WILLIAM P BEEBER
E WARING WILSON
HARRY J ALKER JR

ATTORNEYS AND COUNSELLORS AT LAW
1419 LAND TITLE BUILDING
PHILADELPHIA

as loan

Received, October 15, 1930, of Alfred A. DuBan, certificates totaling twelve hundred shares of National Products Corporation Common stock belonging to him, which I am to return to him on demand if not sooner.

Harry Beeber Jr.

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
WILLIAM P. BEEBER
E. WARING WILSON
HARRY J. ALKER JR

ATTORNEYS AND COUNSELLORS AT LAW
1419 LAND TITLE BUILDING
PHILADELPHIA

Plaintiffs' Exhibits 274a

Received, November 24, 1930, of Alfred A. DuBan certificates totaling t.o thousand shares of National Dairy Products Corporation common stock to be returned on demand or sooner

These certificates with the certificates already deliv red for fourteen hundred shares of National Dairy Products Corporation common stock constitute a loan to Harry J. Alker Jr., making thirty-four hundred shares in all.

Harry J. Alker

RECEIVED this 29th day of September, 1931, from Alfred A. DuBan the following certificates of the Common stock of National Dairy Products Corporation as a loan to me, and to be used by me as collateral security for loans made to me by the Integrity Trust Company of Philadelphia, State of Pennsylvania:-

C61465	100 shares
C61466	100 shares
C61467	100 shares
C61468	100 shares
C61469	100 shares
C61470	100 shares
C61471	100 shares
C61472	100 shares
C61473	100 shares
C61474	100 shares
	1,000 shares

This is to acknowledge also that I have 3,400 shares of National Dairy Products Corporation Common stock loaned me by Mr. DuBan and pledged sometime ago.

Harry J. Acker Jr

Plaintiffs' Exhibits

KNOW ALL MEN BY THESE PRESENTS That I, MAMIE DuBAN, Executrix of the will of Alfred A. DuBan, deceased, do hereby assign, transfer, set over and deliver unto MAMIE DuBAN all the following:

Claim against Dr. Andrew Anders for 913 1/5 shares of National Dairy Products Corporation;

Claim against James Hewitt, Jr., for $400;

Claim against Blanche Peters for $200;

Claim against Harry J. Alker, Jr., together with all interest of the estate in the Metropolitan Life Insurance policy assigned as collateral;

TO HAVE AND TO HOLD the same to and for the use, ownership and behoof of the said Mamie DuBan and her executors, administrators and assigns, absolutely.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of April, A.D. 1946.

Witness:
Lena Loewner
J Kenneth Smith

Mamie DuBan

Executrix of the will of
Alfred A. DuBan, deceased.

Plaintiffs' Exhibits

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

On this the 12th day of April, 1946 before me, a notary public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have set my hand and official seal.

J. Herbert Shuler
Notary Public
My commission expires

Plaintiffs' Exhibits

277a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA

December 24, 1942

Mrs. Alfred A. DuBan,
The Cambridge,
Germantown, Phila., Pa.

Dear Mrs. DuBan:

Enclosed find check for $880, being the dividend on the 4400 shares of stock, which I understand you did not receive this week.

Sincerely yours,

HJ Nekus

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
HARRY J. ALKER, JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL, 2ND
R. GRAY HALL

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA

February 11, 1943

Miss Lena Loevner,
c/o Mrs. Du Ban,
Cambridge Apts.,
Germantown, Philadelphia.

Dear Miss Loevner:

I have delivered to Mr. Heuer to-day 440 shares of National Dairy Products Corporation Common for Mrs. Du Ban. I wish you would look among your records and you will find an assignment by me of the 440 shares which were then held by Montgomery Scott Company and Lois executed an assignment to me for their stock. Mr. Du Ban got some of the stock while he was living and you have given credit for that in the stock return.

I hope to get release of stock at Montgomery Scott in Lois' name, as, Harry, her husband is now dead and I do not want her to be bothered about anything until we get settled. I will do what I can to get the balance of the stock to you at an early date.

I wish you would stop in with your record so that I can tell how many shares I own. I sort of left it to Mr. Du Ban to keep the record and I hope to get it cleaned up in the next couple of months. I certainly appreciate Mr. Du Ban's and Mrs. Du Ban's goodness to me in the matter. They have both always been my real friends.

Sincerely yours,

Wicken

Plaintiff's Exhibits

2798

ATTORNEYS AND COUNSELLORS AT LAW

1500 ... TITLE BUILDING

PHILADELPHIA

Dear Mrs Dixon

I rec'd. yr kind note
Sooner shd. have done
so but many reminders the
Number of chairs. I
hope to have them all taken
to yr son.

Sincerely yrs.

Thomas Eakins

SEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL

ATTORNEYS AND COUNSELLORS AT LAW

J. LEVERING JONES
DIMNER BEEBER
HENRY C BOYER

HARRY J. ALKER JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL 2ND
R. GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

December 21, 1944

Miss Lena Lovner,
2032 Walnut Street
Philadelphia, Pa.

Dear Miss Lovner:

I want to come to some arrangement before the end of the year about the DuBan National Dairy Stock.

I have been calling you any number of times but don't seem to be able to get you. Can you arrange to stop here during the next week, so that you and I know where we stand. George Heuer intimated that you did not know how I arrived at the $1925.00 shs

Sincerely yours,

HD Nelly

Plaintiffs' Exhibits

284a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

5-31-45

Dear Mrs. Du Ban:

I enclose check for $673.75 for dividend on the 1925 shares of National Dairy Products Corp. stock.

I am sorry I am a little late but money is slow coming in.

Sincerely yours,

H. G. Keller

Mrs. Alfred A. Du Ban,
Cambridge Apts.,
Philadelphia, Pa.

J LEVERING JR
SIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING

PHILADELPHIA

September 10, 1945

Dear Mrs. Dutton:

Enclosed is check for $675.00

in payment of dividend on the 100 shares

of Pennsylvania Steel Foundry

Sincerely,

Mrs. Norman L. Dutton
[illegible]
School Lane
Germantown, Philadelphia

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

March 23, 1946

Miss Lena Loevner
2032 Walnut Street
Philadelphia, Pennsylvania

Dear Miss Loevner:

Mrs. DuBan has practically cleaned up all of the matters in the estate. Unless she intends to keep the estate separate from her own affairs, I would have her execute the enclosed so that they all become hers and hereafter all the things will appear in her own account. If anything should happen to her, then it wouldn't be necessary to take out letters D.B.N. in Mr. DuBan's estate and would save a lot of expense. It might be well to see me about it before you talk to Mrs. DuBan. If Mrs. DuBan wants me to run up and see her about it, let me know.

Very truly yours,

H Shekey

Plaintiffs' Exhibits 287a

J. LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J. ALKER JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

May 24, 1946.

Mrs. Alfred A. DuBan,
Cambridge Apartments,
Germantown, Phila.

Dear Mrs. DuBan:

I enclose herewith for you to place in your box the assignment from you as Executrix to you individually of the claims against Dr. Ander, Mr. Hewitt, Blanche Peters and myself. Will you place this among your papers.

Do you wish me to write Mr. Hewitt and Blanche there in reference to those claims?

I think there will be a decision by the Supreme Court of the United States in my case on Monday, or perhaps Monday a week. I am holding my breath hoping it will be favorable. I hope it will not be long now before I will be able to return that stock to you. I have certainly hated to keep you waiting so long.

I reported to Miss Loewer in re your [illegible] tax laws.

Hoping your eyes are much better,

Sincerely yours,

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
HARRY J. ALKER, JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL, 2ND
R. GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1005 LAND TITLE BUILDING
PHILADELPHIA 10

December 11, 19[illegible]

Mrs. Alfred A. DuBan
Cambridge Apartments
Tinmahicken Avenue and School Lane
Philadelphia, Pennsylvania

Dear Mrs. DuBan:

Enclosed find check for $1045.00, dividend on National Dairy.

I think this is a little more than it should be and will talk to Miss Isaacs about it.

Sincerely yours,

HJAlker

J. LEVERING JONES
DIMNER BEEBER
HENRY C BOYER

HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1508 LAND TITLE BUILDING
PHILADELPHIA 10

December 11, 1947

Miss Lena Loevner
c/o Mrs. Alfred A. DuBan
208 Cambridge Apartments
Germantown, Philadelphia, Pa.

Dear Miss Loevner:

Enclosed find check for $855.00, dividend on 1900 shares of stock.

I don't think this is the correct number, as I think it is a little less than that. I have been asking you to drop in so that we can go over it. Will you drop in at your first opportunity, as I would like the matter closed before Christmas.

Very truly yours,

Plaintiffs' Exhibits

290a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING

PHILADELPHIA IC

March 15, 1948.

Mrs. Alfred A. DuBan,

The Cambridge Apartments,

Philadelphia, Pa.

Dear Mrs. DuBan:

Enclosed find check for dividend in re National Dairy.

We have been swamped with income tax work, which explains the several days' delay.

Sincerely yours,

H. J. Alker, Jr.

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING
PHILADELPHIA 10

December 10, 1948.

Mrs. Alfred A. DuBan
208 Cambridge Apartments
Wissahickon Avenue & School Lane
Philadelphia, Penna.

Dear Mrs. DuBan:

Enclosed find check for $655.00 being National Dairy dividend. I hope one of these days Miss Loevner will be able to come in and sit down and determine just how many shares of National Dairy are coming to you. Her record and my record just don't seem to gee and I want to see what the difference is.

Sincerely yours,

H - Kelley

J. LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

September 12, 1949

Mrs. Alfred A. DuBan
208 Cambridge Apts.,
Wissahickon Ave. & School Lane,
Phila., Pa.

Dear Mrs. DuBan:

Enclosed please find check for $962.50, dividend on 1925 shares of National Dairy stock. Could you have Miss Loener here with her record of the number of shares involved. I would like to check with her my records.

I trust you are in good health. Lois has been seriously sick in bed at the Warwick for the last ten days.

Sincerely yours,

HJAlker

1925 / 50 / 962.50

Plaintiffs' Exhibits

293a

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
HARRY J. ALKER, JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL, 2ND
R. GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

March 11, 1950

Mrs. Alfred A. DuBan
208 Cambridge Apts.
Wissahickon Ave. & School Lane,
Gtn., Phila., Pa.

Dear Mrs. DuBan:

Enclosed please find check for $1,155.00 being dividend on the 1925 shares.

With every good wish,

Sincerely yours,

Plaintiffs' Exhibits 294a

J LEVERING JONES
DIMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

December 11, 1950

Mrs. Alfred A. DuBan
208 Cambridge Apts.
Wissahickon Ave. & School Lane
Gtn., Phila., Pa.

Dear Mrs. DuBan:

Enclosed find check for $1,732.50 being the dividend received today on the 1925 National Dairy stock.

Sincerely yours,

J F Dilkes Jr

J LEVERING JONES
DUMNER BEEBER
HENRY C BOYER
HARRY J ALKER JR
E WARING WILSON
HORACE R HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R GRAY HALL

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING

PHILADELPHIA 10

March 12, 1951

Mrs. Alfred A. DuBan
208 Cambridge Apts.
Wissahickon Ave. & School Lane,
Gtn., Phila., Pa.

Dear Mrs. DuBan:

Enclosed find check for $1,347.50 being the dividend on 1925 shares of National Dairy stock.

Very truly yours,

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER

HARRY J. ALKER JR.
E. WARING WILSON
HORACE R. HAYDAY
ALFRED D. BRUCE
EDWIN HALL, 2ND
R. GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW
1505 LAND TITLE BUILDING
PHILADELPHIA 10

June 11, 1951

Mrs. Alfred A. DuBan
208 Cambridge Apts.
Wissahickon Ave. & School Lane
Gtn., Phila., Pa.

Dear Mrs. DuBan:

Enclosed find check for $1,347.50 being dividend on 1925 shares of National Dairy Common. Sometime have Miss Loevner stop in in reference to the matter.

With every good wish,

Sincerely yours,

Harry

Plaintiffs' Exhibits 297a

J. LEVERING JONES
DIMNER BEEBER
HENRY C. BOYER
HARRY W. ALKER JR
E WARING WILSON
HORACE R. HAYDAY
ALFRED D BRUCE
EDWIN HALL 2ND
R. GRAY HALL
ASHTON DEVEREUX

ATTORNEYS AND COUNSELLORS AT LAW

1505 LAND TITLE BUILDING

PHILADELPHIA 10

June 10, 1952

Mrs. Alfred A. DuBan
208 Cambridge Apartments
Wissahickon Ave. and School La
Philadelphia, Pa.

Dear Mrs. DuBan:

Enclosed find check for $1,443.75, being the dividend on the 1925 shares of stock.

Hoping you are not feeling this heat too much,

Sincerely yours,

STOCK POWERS, S-220

For Value Received, P-29

hereby sell, assign and transfer unto _____

One hundred twenty-five (125) Shares of the Common

Capital Stock of the Ohio Leather Co. Company

standing in _____ name on the books of said _____

_____ represented by Certificate No. _____ herewith

and do hereby irrevocably constitute and appoint _____

_____ attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated _____

In Presence of

Edward G. Gunn

Thomas J. Meyers

(CO)

Plaintiffs' Exhibits

299a

ORDINARY

Assignment of Policy

DUPLICATE

BEFORE EXECUTION OF THIS ASSIGNMENT
THE INSTRUCTIONS ON THE REVERSE SIDE SHOULD BE CAREFULLY READ.

For Value Received, I hereby assign Policy No. 6641296A issued by the Metropolitan Life Insurance Company of New York on the Life of Harry J. Alker, Jr., with all the proceeds thereof and all sums of money, interest, benefit and advantages whatsoever accrued and to accrue thereunder unto Alfred A. DuBon,

address: 835 Land Title Building, (Number, Street) Philadelphia, (City) Pa., (State)

creditor (Relationship to Insured (If creditor, so state)) and to his executors, administrators, successors or assigns.

This assignment is subject to any existing indebtedness to the Metropolitan Life Insurance Company under this Policy.

IF CORPORATION PLACE CORPORATE SEAL HERE

Dated at Philadelphia

this 8th day of June, 19 36

Anna M. McKnight (Witness) — Harry J. Alker (Signature) [SEAL]

(Witness) — (Signature) [SEAL]

(Witness) — (Signature) [SEAL]

NOTARIAL ACKNOWLEDGMENT FOR INDIVIDUALS

State of Pennsylvania, County of Philadelphia } ss.: On this 8th day of June 19 36 before me personally came Harry J. Alker, Jr.

to me known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

Anna M. McKnight

NOTARIAL ACKNOWLEDGMENT FOR CORPORATIONS

State of, County of } ss.: On this day of 19 before me personally came of

and of

to me known, who, being by me duly sworn did jointly and severally depose and say that they are respectively the and of the

the corporation described in and which executed the foregoing instrument; that they know the seal of said corporation; that the seal affixed to this instrument is said corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they have signed their names thereto by like authority.

Recorded and Filed at the Home Office of the Metropolitan Life Insurance Company

The Company assumes no obligation as to the validity and sufficiency of this assignment, and does not pass upon its legality; but reserves the right to demand proof of interest in case of claim by assignee.

This assignment shall not be binding upon the Company unless it be filed with the Company at its Home Office.

19 Secretary.

District Debit No.

If Monthly Premium Debit Policy, Give D.L.P.

Premiums Paid to and for Month of 193

FOR HOME OFFICE USE

Form 080 Sept. 1932 PRINTED IN U.S.A.

Checked by Duplicate sent to Date

Plaintiffs' Exhibits

300a

ORDINARY

Assignment of Policy

BEFORE EXECUTION OF THIS ASSIGNMENT
THE INSTRUCTIONS ON THE REVERSE SIDE SHOULD BE CAREFULLY READ.

For Value Received, I hereby assign Policy No. 641296A, issued by the Metropolitan Life Insurance Company of New York on the Life of myself Harry J Alker with all the proceeds thereof and all sums of money, interest, benefit and advantages whatsoever accrued and to accrue thereunder unto Alfred A Dutton

address: 8 W 7th Ave Lansdale Montg Penna.
Number Street City State

Brother and to his executors, administrators, successors or assigns.
Relationship to Insured (If creditor, so state)

This assignment is subject to any existing indebtedness to the Metropolitan Life Insurance Company under this Policy.

IF CORPORATION PLACE CORPORATE SEAL HERE

Dated at Penn

this 24 day of Feb, 19 33

John A. Barnes
Witness

Harry J Alker [SEAL]
Signature

Witness

[SEAL]
Signature

Witness

[SEAL]
Signature

NOTARIAL ACKNOWLEDGMENT FOR INDIVIDUALS

State of Pennsylvania
County of Philadelphia } ss.:

On this 25th day of February 1933 before me personally came Harry J. Alker, Jr.

to me known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

Elizabeth M Marr
Notary Public
My Commission Expires April 1, 1935

NOTARIAL ACKNOWLEDGMENT FOR CORPORATIONS

State of
County of } ss.:

On this day of 19 before me personally came

of

and of

to me known, who, being by me duly sworn did jointly and severally depose and say that they are respectively the and of the

the corporation described in and which executed the foregoing instrument; that they know the seal of said corporation; that the seal affixed to this instrument is said corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they have signed their names thereto by like authority.

Recorded and Filed at the Home Office of the Metropolitan Life Insurance Company

The Company assumes no obligation as to the validity and sufficiency of this assignment, and does not pass upon its legality; but reserves the right to demand proof of interest in case of claim by assignee.

This assignment shall not be binding upon the Company unless it be filed with the Company at its Home Office.

19 Secretary.

District Debit No.

If Monthly Premium Debit Policy, Give D.I.P.

Premiums Paid to and for Month of 19

FOR HOME OFFICE USE

Form O20 Apr. 1932 PRINTED IN U.S.A.

Checked by Duplicate sent to Date

Plaintiff's Exhibits

301a

INSURANCE & INVESTMENT
LOAN DIVISION

METROPOLITAN LIFE INSURANCE COMPANY

HOME OFFICE, 1 MADISON AVENUE, NEW YORK, N. Y.

APR-7'38

To the Policyholder

We have granted the policy loan applied for. This statement of the loan, which is a receipt for items deducted from the loan, is subject to the condition that any check or draft received in connection with this loan transaction may be handled for collection in accordance with the practice of the collecting bank or banks, and that this statement shall be void as a receipt if the full amount of such check or draft is not received by the Company.

Interest on the loan and at the rate stipulated in the policy is payable each year on the anniversary date of the policy while the loan remains unpaid.

JOHN P. ROGERS, *Assistant Secretary.*

DISTRICT: RITTENHOUSE PA

POLICY NUMBER: 6641296-A-HARRY J ALKER JR MONE

CHECK PAYABLE TO

CREDITS				DEDUCTIONS						
NEW LOAN (1)	INCREASED LOAN (2)	DIVIDENDS (3)	SUNDRIES (4)	PREVIOUS LOAN (5)	INT. ON OLD LOAN TO (6)	AM'T OF INTEREST (7)	PREMIUM DUE (8)	AM'T OF PREMIUM (9)	SUNDRIES (10)	AM'T OF CHECK (11)
	7251.28			6200.00	4-1-38	151.28				
					INT. ON NEW LOAN TO					
				CREDIT DISTRICT OFFICE BAL-MGR- M COHEN					900.00*	

The loan, with accrued interest, if any, may be repaid any time while the policy is in force. If you are unable to repay the full amount at one time, the Company is willing to accept partial payments as low as $5 to suit your convenience.

Form 0106—May 1937—PRINTED IN U.S.A.

METROPOLITAN LIFE INSURANCE COMPANY

PREMIUM NOTICE

The premium on this policy will be due on the date and in the amount stated, if the policy is then in force. Check, draft, or money order should be made payable to the Metropolitan Life Insurance Company.

Payable to
Metropolitan Life Insurance Company
Stuart Bldg., 3rd Fl.
230 So. Broad Street
(Mitchell House) Phila. 2, Pa.

Please present this Notice when paying premium. (Over)

Policy Number	Premium Due Date Mo	Day	Yr	Frequency of Payment	$ Amount of Premium
6 641 296A	2	1	54	Q	413.00

HARRY J ALKER JR

3d 1/29/54

ALFRED A DU BAN

CAMBRIDGE APART-GERMANTOWN
PHILA PA

If the post office address is other than shown on this Notice, please notify the Company.

026 B (7 53)

Plaintiffs' Exhibits 303a

Metropolitan Life Insurance Company
One Madison Avenue, New York 10, N.Y.

POSTMASTER:—If the addressee has moved, please forward to the new address if it is obtainable.

A GOOD HINT FOR GOOD [illegible]

persists... your doctor.

METROPOLITAN LIFE INSURANCE COMPANY

A MUTUAL LIFE INSURANCE COMPANY

INCORPORATED BY THE STATE OF NEW YORK

NO. 6641296-A

HEREBY INSURES THE LIFE OF

HARRY J. ALKER JR.

herein called the Insured, in accordance with the terms of this Policy, No. 6641296- A and

Promises to Pay at its Home Office in the City of New York

FIFTY THOUSAND Dollars

upon the surrender of this Policy, to the Insured if living on the 1ST day of NOVEMBER 1969,

or to OR TO-RALPH ALKER, BROTHER AND MAY L. CORDSON, SISTER, IN EQUAL SHARES. Beneficiary,

upon receipt of due proof of the prior death of the Insured. The right on the part of the Insured to change the Beneficiary, in the manner hereinafter provided, is reserved.

or to SISTER, IN EQUAL SHARES. Beneficiary, upon receipt of due proof of the prior death of the Insured. The right on the part of the Insured to change the Beneficiary, in the manner hereinafter provided, is -- reserved.

This Policy is issued in consideration of the Application therefor, copy of which Application is attached hereto and made part hereof, and of the payment for said insurance on the life of the above named Insured, of ONE HUNDRED AND FIFTY EIGHT Dollars and -- Cents, (which maintains this Policy in force for a period of ONE months from its date of issue, as set forth below) and of the payment hereafter of a like MONTHLY premium on each 1ST day of EVERY MONTH (hereinafter called the due date), until THIRTY NINE full years premiums shall have been paid or until the prior death of the Insured.

The Provisions and Benefits printed or written by the Company on the following pages are a part of this Policy as fully as if recited over the signatures hereto affixed.

In Witness Whereof, the Metropolitan Life Insurance Company has caused this Policy to be executed this 1ST day of NOVEMBER 1930 which is the date of issue of this Policy.

Secretary. Policy Registrar. President.

ENDOWMENT AT AGE 85 POLICY.

F1

Age 46

Premiums payable until anniversary nearest 85th birthday or prior death.

Annual Distribution of Divisible Surplus.

PROVISIONS AND BENEFITS

1. Payment of Premiums:—All premiums are payable, on or before their due dates, at the Home Office of the Company, or to an authorized Agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, Vice President, Actuary, Treasurer or Secretary of the Company and countersigned by the Agent or other authorized representative of the Company receiving the premium.

The payment of a premium shall not maintain this Policy in force beyond the due date when the next premium is payable, except as hereinafter provided.

A grace period of thirty-one days, without interest charge, will be granted for the payment of every premium after the first, during which grace period the insurance shall continue in force, but if the Insured dies during such period the portion of the unpaid premium for insurance for the current policy month shall be considered as an indebtedness to the Company for which this Policy is security. If the premium shall have been paid for the period during which the death of the Insured occurs, then, if such period be greater than one month, the Company will pay, in addition to the amount otherwise payable under this Policy, that portion of such premium applicable to the policy month or months subsequent to the policy month when death occurred.

On written request of the Insured, approved by the Company at its Home Office, premium payments may be changed, at any anniversary of the date of issue of this Policy, so as to be payable annually, semi-annually or quarterly in accordance with the published rates in force at the date of issue of this Policy.

2. Age: If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

3. Incontestability: This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for non-payment of premiums, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to, and made part of, this Policy.

4. Entire Contract:—This Policy and the application therefor constitute the entire contract between the parties, and all statements made by the Insured, shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense of a claim hereunder unless it be contained in the application therefor and a copy of such application is attached to this Policy when issued.

5. Suicide:—If the Insured within one year from the date of issue hereof die by his own hand or act, whether sane or insane, the liability of the Company hereunder shall be limited to an amount equal to the premiums which have been received, without interest.

6. Change of Beneficiary:—When the right to change the beneficiary is reserved, and if there be no written assignment of this Policy on file with the Company, the Insured may (while this Policy is in force) designate a new beneficiary, with or without reserving the right of change thereafter, by filing written notice of this change at the Home Office of the Company accompanied by this Policy for endorsement of the change thereon by the Company. No such change shall be effective unless and until it is so endorsed on the Policy, but upon such endorsement the change will be deemed to have been made as of the date the Insured signed said written notice of change whether the Insured be living at the time of such endorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office accompanied by this Policy for such endorsement by the Company.

In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured unless otherwise provided herein or endorsed hereon.

7. Assignment:—No assignment of this Policy shall be binding upon the Company unless it be executed upon blanks furnished by the Company and filed with the Company at its Home Office in the City of New York. The Company assumes no obligation as to the validity and sufficiency of any assignment.

8. Agents:—No Agent is authorized to waive forfeitures, to alter or amend this Policy, to accept premiums in arrears or to extend the due date of any premium.

9. Options on Surrender or Lapse:—After premiums for two full years shall have been paid on this Policy, the Insured, if the right to change the beneficiary has been reserved, or the Insured and any beneficiary or beneficiaries of record, if the right to change the beneficiary has not been reserved, or the Assignee of record, if any, upon written request filed with the Company at its Home Office, together with the presentation of this Policy for legal surrender or endorsement within three months after the due date of any premium in default, shall be entitled to one of the following options:

(*a*) CASH SURRENDER VALUE—

To receive the Cash Surrender Value which shall be the reserve on this policy (omitting fractions of a dollar per thousand dollars of insurance) less [illegible] and this policy years of not more than

TABLE OF GUARANTEED LOAN VALUES AND SURRENDER OPTIONS

Computed in accordance with Paragraph 9 for a Policy free from indebtedness and without paid-up additions.

END OF YEAR	CASH VALUE OR LOAN VALUE	PARTICIPATING PAID-UP ENDOWMENT INSURANCE	NON-PARTICIPATING TERM INSURANCE with CONTINUED FOR Years	Months	NON-PARTICIPATING PAID-UP PURE ENDOWMENT
2	$ 32	$ 64	2	7	$
3	54	108	4	2	
4	81	158	5	11	

To receive the Cash Surrender Value which shall be the reserve on this policy (omitting fractions of a dollar per thousand dollars of insurance) less a surrender charge during the second and third policy years of not more than 2½% of the amount of insurance under this Policy and plus the reserve on any outstanding paid-up dividend additions in all cases taken at due date of premium in default and less any indebtedness to the Company for which this Policy is security, or,

(*b*) PARTICIPATING PAID-UP ENDOWMENT INSURANCE—

To have the insurance continued in force for an adjusted amount from the due date of premium in default as participating paid-up Endowment Insurance, payable at the same time and under the same conditions as this Policy. Such paid-up Endowment Insurance shall be for such an amount as the Cash Surrender Value as defined under Option (*a*) above plus the amount of any dividend accumulations, will purchase (in even dollars) at the then attained age of the Insured when applied as a net single premium. Such paid-up Endowment Insurance may be surrendered at any time for its then cash surrender value (*viz.*, its full reserve at the date of such surrender less any indebtedness to the Company on such paid-up Endowment Insurance); or,

(*c*) NON-PARTICIPATING PAID-UP TERM INSURANCE—

To have the insurance continued in force from the due date of the premium in default as non-participating paid-up Term Insurance. The total amount of such Term Insurance shall be equal to the amount of insurance under this Policy plus the amount of any outstanding paid-up additions and of any dividend accumulations and less the amount of any indebtedness; and the term (in years and whole number of months) for which such paid-up Term Insurance will be continued shall be such as the Cash Surrender Value as defined under Option (*a*) above plus the amount of any dividend accumulations, will purchase, at the then attained age of the Insured when applied as a net single premium. If such single premium be more than sufficient to continue the said total amount of insurance to the end of the Endowment period named in this Policy, the excess shall be used as a net single premium to purchase, at the then attained age of the Insured, non-participating paid-up Pure Endowment Insurance payable at the end of the Endowment period. Such paid-up Term Insurance and paid-up Pure Endowment Insurance, if any, may be surrendered at any time for its then Cash Surrender Value (*viz.*, its full reserve value at date of surrender).

In the event of default in the payment of any premium after premiums for two full years shall have been paid on this Policy, if the person or persons entitled to the options as provided above shall not exercise one of the foregoing options, in the manner hereinbefore provided, within three months after the due date of the premium in default, this Policy will be continued by the Company as non-participating paid-up Term Insurance as provided under Option (*c*) above.

The Company, at its discretion, may defer the payment of any Cash Surrender Value under this section for a period not exceeding ninety days after the application therefor is received by the Company.

The Reserves and the Net Single Premiums mentioned above shall be computed upon the American Experience Table of Mortality with interest at three and one-half per centum per annum.

970 Ord.—6-31

Face amount of policy continued for period specified		For each $1,000 of the amount of insurance		For each $1,000 of the amount of insurance		For each $1,000 of the amount of insurance If the amount of insurance is other than $1,000, the Loan, Cash and Paid-up and Pure Endowment Values, as shown in the table, will be proportionate.
3	54	108	4	2		
4	81	158	5	11		
5	102	195	7	0		
6	124	231	7	11		
7	145	257	8	8		
8	168	301	9	4		
9	190	334	9	10		
10	213	367	10	3		
11	236	398	10	7		
12	260	428	10	10		
13	283	457	11	0		
14	307	486	11	1		
15	330	513	11	2		
16	354	539	11	2		
17	378	564	11	2		
18	401	589	11	2		
19	425	612	11	1		
20	448	635	11	0		
25	564	734	10	4		
30	677	817	9	0	108	

The values shown in the above table are for complete policy years, with surrender charge, if any, deducted. If the Endowment term exceeds the limit of the table, values for later years will be computed upon the same basis and furnished on request.

Should default in payment of any premium, after premiums for two full years have been paid, occur at any other time than at the anniversary date of the Policy, the values for the end of the preceding policy year shall be increased in an amount or for a period equal to one-twelfth of the increase in value for the then current policy year, according to the above table, for each twelfth of such year for which premiums shall have been paid.

The Cash Surrender Value at any time other than at the end of the period for which premiums have been paid shall be the Cash Surrender Value at the end of such period less interest from the date of payment to the end of such period at the rate of six per centum per annum.

The Loan Values provided for in the above table for the end of a policy year can be obtained at any time during such policy year in the manner and according to the clause entitled "Loans."

Ord. D - 86 Age 46

Plaintiffs' Exhibits

306a

Page No. 54 66-1296-A

APPLICATION DATED [illegible] OF

Oct.13,1936 Harry J Alker Jr.

To the Metropolitan Life Insurance Company:

The undersigned hereby amends the application for Life Insurance made to your Company, on date stated above, in the following particulars, and these amendments and declarations are to be taken and considered as part of the said application and subject to the agreements, covenants and statements therein contained and the said application together with these amendments is to be taken as a whole and considered as the basis of and as forming part of the contract of insurance.

By changing the plan of insurance to Endowment at Age 85 and correctly

the amount of insurance is $50,000.

By correcting stating that in the event of my death, I desire the proceeds of the policy payable to Ralph Alker, Brother and [illegible] Sister, In equal shares.

In all other respects said application is confirmed and true, and I hereby ratify and confirm the statements therein made and the [illegible]

Dated at [illegible] this 31 day of Oct 19 37

Harry Jacker

Witness

Witness

Applicant

Parent or Guardian

If Applicant is a Minor

Part A Use Black Ink for Answers and Signatures

Application to the METROPOLITAN LIFE INSURANCE COMPANY

(INCORPORATED BY THE STATE OF NEW YORK)

Form 086 K-7
Dec. 1929
ORDINARY DEPT.
PRINTED IN U.S.A.

TO BE USED WHEN AMOUNT APPLIED FOR IS OVER $2,000—ORDINARY OR INTERMEDIATE

1. FULL NAME of Person whose life is to be insured. *(Print)* Henry Alter Jr

2. Residence. If in country, state R. F. D. Route.
No. 724 Street (Print) Chestnut
City or town (Print) Hornick
County Monty State Ia
How long have you resided at this address? one year
If less than one year give previous address
To what address shall communications be sent? Residence / Place of Business

3. Place of birth. Town or City. N. U. C. State.

4. Date of birth. Month Dec Day 16 1884
(Be sure age and date of birth are in accord) Age nearest birthday? 46 Years

5. Single, Married, Widower or Widow? Divorced or Separated? single

6. Occupation. If more than one state all. Nature of Employer's Business
Carpenter Contractor

7. Exact duties of Occupation.
Lumber Dealer

8. Any change in Occupation contemplated? If yes, give particulars
No

9. Place of Business. (City, Street and No.) By whom employed?
1419 Land St. Hornick Myself

10. Former Occupations. (Within the last ten years)
None

11. Do you, within the next twelve months, contemplate journeying outside the United States or Canada or making an ocean trip? If yes, state when, where to, for what purpose and for how long? No

14. Amount of Insurance desired. $ 5000.00 Ordinary
$ Intermediate
Prem. Payable Annually, Semi-An., Quarterly, Monthly.

15. Plan of Insurance as designated in Rate Book. 10 Year Rem. Term

16. (a) Beneficiary in case of your death. *(Print)*
Ralph Alter, brother Age 48
Cordova, Mo. Lives with Insured
Relationship of Proposed Beneficiary Brother
Occupation Teller - Store Age 52
P. O. Address Hornick Ia R 2 Williams

(b) Do you reserve the right to change the beneficiary at any time without the consent of Beneficiary herein designated? (Answer YES or NO) Yes

17. Is any one entirely dependent on you for support? If yes, give particulars.
No

18. Are you now insured in this or any other Company? If yes, give particulars.

Name of Company	Amount	Kind of Policy	Year Issued	If in Metropolitan give Policy No.
Mutual Life	5000	10 Yr Rem. Term	36	7[illegible]
Prov. Mutual	2500	20 Pay Life	36	7[illegible]
N.Y. Life	1000	20 Pay Life	37	3[illegible]

What amount of the above insurance carries,
(a) Disability Provision? $
(b) Accidental Death Benefit? (Double Indemnity) $ None

If now applying for Disability Provision, state amount of weekly benefit carried under Health Policies issued by this or by any other Company. $

Is the policy for which you are hereby applying intended to take the place of insurance carried with this or any other Company? If yes, give particulars.
No.

Part B Use Black Ink for Answers and Signatures

What is your occupation?

2. Have you ever undergone ... receive the exact amount ... and name of Company

3. Have you during the past ... person suffering from tube...

4. Has any one of your parents ... cancer, diabetes, epilepsy ... particulars.

5. Have you ever been an ... asylum, hospital, sanator... ailment and name of institu...

6. Have you ever changed ... and when?

7. Have you ever received ... benefits from any govern... have you ever received ... or health, workmen's ... reason in full.

8. Have you ever taken ...

9. Have you ever used opium ...

10. To what extent do you ...

11. Have you ever used ...

12. **Have you ever suffered from any ailment or disease of**

(a) The Brain or Nervous ...

(b) The Heart or Lungs ...

The Stomach or ... kidneys or Genito-U...

(c) The Skin, Bones, ... Eyes?

Have you ever had ... Gout or Syphilis?

Have you ever had ... Insanity?

Have you ever had ...

ANY Form O86 K-7 Dec. 1929 ORDINARY DEPT. PRINTED IN U.S.A.

DIATE

Prem. Payable [illegible], Semi-An., Quarterly, Monthly.

liate

Part B Use Black Ink for Answers and Signature

Continuation of the Application. Applicant's Statements to the Medical Examiner.

The spaces below are for the Applicant's answers only. Nothing but his answers should be inserted. Statements of or comments by Medical Examiner must be recorded in Part C.

		(Insert answers below)
	What is your occupation? Exact duties.	Attorney - Dep. Sher
2.	Have you ever undergone a medical examination for insurance and failed to receive the exact amount or kind of policy applied for. If yes, give particulars and name of Company.	no.
3.	Have you during the past year resided or been intimately associated with any person suffering from tuberculosis? If so, give particulars and precautions taken.	no.
4.	Has any one of your parents, brothers or sisters now, or ever had, tuberculosis, cancer, diabetes, epilepsy, insanity or any hereditary disease? If yes, give particulars.	no
5.	Have you ever been an inmate of, or have you ever received treatment at an asylum, hospital, sanatorium or cure? If yes, give date, duration, name of ailment and name of institution.	no
6.	Have you ever changed residence or traveled for your health? If yes, why and when?	no
7.	Have you ever received or applied for a pension or disability or compensation benefits from any government or from any municipal or private corporation or have you ever received or applied for any benefit under a policy of accident or health, workmen's compensation or fraternal insurance? If yes, state reason in full.	no
8.	Have you ever taken insulin treatment? If yes, state dates and for how long.	no
9.	Have you ever used opium, chloral, cocaine, or other narcotics?	no
10.	To what extent do you use beer, wine or other alcoholic beverages?	no
10a.	Have you ever used any of them to excess? If so, when and for how long?	no

11. **Have you ever suffered from any ailment or disease of**

		Yes or No	Name of each Disease, No. of Attacks	Date	Duration	Severity	Results, and if within five years, name and address of every Physician consulted
(a)	The Brain or Nervous system?	no					
(b)	The Heart or Lungs?	no					
	The Stomach or Intestines, Liver, Kidneys or Genito Urinary Organs?	no					
	The Skin, Bones, Glands, Ears or Eyes?	no					
	Have you ever had Rheumatism, Gout or Syphilis?	no					
	Have you ever had Paralysis or						

Per Age 40
Height 5 ft 2 in
Weight 140
Age 42
Married
iary at any 46
inated? (Answer YES or
If yes, give particulars.

? If yes, give particulars.

Policy	Year Issued	If in Metropolitan give Policy Nos.
2	36	7832
	36	7846
6	37	3270

y) $ Nil

iount of weekly benefit carried
Company. $

intended to take the place of
? If yes, give particulars.

8. Place of Business. (City, Street and No.) [illegible] By whom employed?

1449 Lord St. Hamilton Ont. [illegible]

10. Former Occupations. (Within the last ten years.)

None

11. Do you, within the next twelve months, contemplate journeying outside the United States or Canada or making an ocean trip? If yes, state when, where to, for what purpose and for how long?

No

12. Have you any intention of making aerial flights within the next two years? If yes, give particulars.

No

13. Have you any other application or negotiation for life, accident, or health insurance now pending or contemplated? If yes, give particulars.

No

(a) Disability Provision? $.....

(b) Accidental Death Benefit? (Double Indemnity) $ Nil

If now applying for Disability Provision, state amount of weekly benefit carried under Health Policies issued by this or by any other Company. $

Is the policy for which you are hereby applying intended to take the place of insurance carried with this or any other Company? If yes, give particulars.

No.

What amount have you paid in [illegible] on account of the first premium? $4.79

Corrections and Amendments. (For Home Office use.)

23. Have you ever applied to any Company or Association without receiving Insurance in the amount or on the plan applied for, or at your actual age, or at the normal premium therefor? If yes, give particulars.

No

Company or Association	Year	If issued as applied for, what premium different?	Declined or postponed	If not advised, so state

To be completed in the case of a woman Applicant, if ever married.

24. What are (in full) the sources of your income?

25. Number of children living, age and occupation of each.

26. Husband's name ..... Age .....

(a) Business .....

(b) In what Companies and for what amount is he insured in your favor? .....

If not insured in your favor, state why not .....

Is application on his life being submitted? .....

The Stomach or Intestines, Kidneys or Genito-Urinary Organs

The Skin, Bones, Joints, Eyes?

Have you ever had Heart Trouble or Syphilis?

Have you ever had Epilepsy, Insanity?

Have you ever had Tuberculosis or Consumption?

If so, give full details.

Have you ever had any Injury or Occupational Disease?

Have you ever had an Operation?

Have you ever had or consulted a physician for any ailment or disease not mentioned in your above answers?

What physician or practitioner named above, have you consulted or treated by, within the last five years, for what illness or ailment?

	Living	
	Yes	Condition of Health if not good, give particulars
1	Yes	
2	Yes	
3	Yes	
4	Yes	
5	Yes	
6	Yes	
7	Yes	
8	Yes	
9	Yes	
10	Yes	
11	Yes	
12	Yes	
13	Yes	
14	Yes	

It is understood and agreed: 1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

2. That no agent, medical examiner or any other person, except the Officers of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promise respecting any benefits under any policy issued hereunder.

3. That no statement made to or by, and no knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or B of this application.

4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant, in which case such policy shall be deemed to have taken effect as of the date of issue as recited on the first page thereof.

5. In case of apparent errors or omissions discovered by the Company in Part A of this application, the Company is hereby authorized to amend this application by noting the change in the space entitled "Corrections and Amendments," and I hereby agree that my acceptance of such policy, accompanied by a copy of the application as amended, shall operate as a ratification of such changes or amendments, provided, however, that no change shall be made as to amount, classification, plan of insurance or benefits unless agreed to in writing by me.

I HEREBY CERTIFY that correctly written, as given by me, and

Signed by Applicant and dated at [illegible] this 13 day of [illegible] 19[illegible]

Dated at Hamilton Ont.

Witness to Signature [illegible]

Signature of Applicant [illegible]

Witness to Signature [illegible]

of weekly benefit carried

mpany. $

ided to take the place of
yes, give particulars.

419

ial age, or at the normal

not already so stated

8	The Stomach or Intestines, Liver, Kidneys or Genito Urinary Organs?
9	The Skin, Bones, Glands, Ears or Eyes?
10	Have you ever had Rheumatism, Gout or Syphilis?
11	Have you ever had Paralysis or Insanity?
12	Have you ever had Diabetes, Disease of the Kidneys?
13	Have you ever vomited or spat blood? If so, give full details.
14	Have you ever had any Accident, Injury or Occupational Disease?
15	Have you ever had any Surgical Operation?
16	Have you consulted a physician for any ailment or disease not included in your above answers?

17. What physician or physicians, if any not named above, have you consulted or been treated by, within the last five years and for what illness or ailment? *If none, so state.*

Name and Address of Physician	Date and Details of Illness	Results
	1911	Dr. P. Vandervoort Palmerton Hospital
	1921	Dr. J. Yarnall Allentown Hospital

Family Record

	Age	Condition of Health of Each. (If not good, give details.)	Age	Cause of Death	How Long Sick	Year of Death	Ages Attained by Grandparents? (Living or Dead)
	Living		Dead				
FATHER				Heart Disease			Father's Father
MOTHER							Father's Mother
BROTHERS							
No. living	1						Mother's Father
No. dead							
SISTERS							Mother's Mother
No. living	6		9				
No. dead	1						

tions on Part B here

make, modify or discha e

ning to the Applicant sh d,

and the full first premi m
l be deemed to have ta e

amend this application y
copy of the application
of insurance or benefit

19

I HEREBY CERTIFY that I have read the answers to the questions in Part A hereof and to the questions in Part B hereof, before signing, and that they have been correctly written, as given by me, and that they are full, true and complete, and that there are no exceptions to any such answers other than as stated herein.

Dated at Saul Feb 13 1930 this 13 day of March 1930

Witness to Signature Saul Hartzell M. D. Signature of Applicant Harry Falkenstein

PROVISIONS AND BENEFITS

10. Reinstatement:—If this Policy shall lapse in consequence of default in payment of any premium, it may be reinstated at any time, unless the Cash Surrender Value has been paid or the non participating paid-up Term Insurance period has expired, upon the production of evidence of insurability satisfactory to the Company and the payment of all overdue premiums with interest at six per centum per annum to the date of reinstatement. Any loan which existed at date of default, together with interest at the same rate to the date of reinstatement, may be either repaid in cash, or, if not in excess of the cash value at date of reinstatement, continued as an indebtedness for which this Policy shall be security.

11. Loans:—At any time after premiums for two full years shall have been paid and while this Policy is in force, except when continued as non-participating paid-up Term Insurance, the Company, on proper and lawful assignment of this Policy and presentation of it for endorsement, will loan to the Insured, if the right to change the beneficiary has been reserved, or to the Insured, and any beneficiary or beneficiaries of record, if the right to change the beneficiary has not been reserved, or to the Assignee of record, if any, on the sole security thereof, an amount not greater than the Cash Surrender Value at the end of the current policy year. Any indebtedness to the Company on this Policy, at the date of said loan, together with interest in advance on said loan to the end of the current policy year and any unpaid premium or premiums for the current policy year, will be deducted from the amount of said loan. Said loan will bear interest at the rate of six per centum per annum payable annually on each anniversary of this Policy. If interest be not paid when due, it shall be added to the principal, until the entire outstanding indebtedness shall equal the Cash Surrender Value, in which event this Policy shall become null and void, after one month's notice shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record, if any. When this Policy is continued for an adjusted amount of participating paid up Endowment Insurance, payment of interest on any loan each year, in advance, to the end of the current policy year, will be required. At the option of the Company, the granting of a loan may be deferred for a period not exceeding ninety days after application therefor is received by the Company, unless such loan is to be applied solely to the payment of premiums due to the Company. At any time while this Policy is in force the whole or any part of any such indebtedness may be repaid. At the death of the Insured or at maturity of this Policy as an Endowment, any such indebtedness to the Company shall be deducted from the amount payable hereunder.

12. Participation in Divisible Surplus:—This Policy is a participating contract except when continued as non-participating paid-up Term Insurance, and the Company will annually, as of the thirty-first day of December of each year, ascertain and apportion any divisible surplus accruing hereon. (See "Notice to Policyholder" below.) Such divisible surplus except as stated in the next succeeding paragraph, will be payable on the next anniversary of this Policy following the next succeeding thirtieth day of April and may, at the option of the Insured, or of the Assignee of record, if any, be either (*a*) paid in cash; or, (*b*) applied within the grace period towards the payment of any premium or premiums; or, (*c*) applied to the purchase of a participating paid-up addition to the sum insured; or, (*d*) left to accumulate to the credit of this Policy at such rate of interest as the Company may declare on such funds, but not less than 3½ per centum per annum, and payable at maturity of this Policy or withdrawable in cash on any anniversary date of this Policy. If no other option is selected by the Insured, or by the Assignee of record, if any, within three months after the date when such divisible surplus is payable, then the divisible surplus will be applied to the purchase of a participating paid-up addition to the sum insured. Such paid-up addition may be surrendered at any time for a cash value at least equal to the amount of the surplus originally applied to its purchase.

Any divisible surplus apportioned to this Policy if and while continued as participating paid up Endowment Insurance shall be applied by the Company to purchase paid-up additions thereto.

NOTICE TO POLICYHOLDER. *The divisible surplus accruing under policies of this class will probably not be sufficient to enable the Company to make any apportionment under this Policy before the end of the third year.*

13. Optional Modes of Settlement:—Upon written election made to, and accepted by, the Company in accordance with the provisions hereinafter contained, the whole or any part of the amount payable according to the terms of this Policy, will, upon receipt of due proof of the death of the Insured, or at the maturity of this Policy as an Endowment, be retained by the Company and paid out according to one of the following OPTIONS:

OPTION 1. (INTEREST PAYMENTS.) By the payment of Interest, either annually, semi-annually, quarterly or monthly at the rate of three and one-half per centum per annum on said amount so to be retained by the Company, the first Interest payment being payable at the end of one year, six months, three months or one month respectively according to the mode of interest payment elected, and by the payment upon the death of the payee, or at the end of a certain number of years, as specified in said written election, of the amount so to be retained by the Company, together with accrued interest, to such payee, or to the person designated in said election; or if there be no person so designated, to the executors or administrators of such payee.

OPTION 2. (INSTALMENT PAYMENTS.) By the payment of equal annual instalments during a number of years certain in accordance with the Table below for each one thousand dollars of the amount so to be retained by the Company, the first instalment being payable immediately.

OPTION 3. (LIFE INCOME.) By the payment of equal annual Instalments for a fixed period of either ten or twenty years, and for so many years longer as the payee shall survive, in accordance with the Table below for each one thousand dollars of the amount so to be retained by the Company, the first Instalment being payable immediately.

OPTION 3—LIFE INCOME

Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALMENT		Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALMENT		Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALMENT	
	Fixed Period of 20 Years	Fixed Period of 10 Years		Fixed Period of 20 Years	Fixed Period of 10 Years		Fixed Period of 20 Years	Fixed Period of 10 Years

Copy of application attached hereto.

to the executors or administrators of such [illegible]

OPTION 2 (INSTALMENT PAYMENTS) By the payment of equal annual or semi-annual instalments during a number of years certain in accordance with the Table below for each one thousand dollars of the amount so to be retained by the Company, the first Instalment being payable immediately.

OPTION 2—Instalment Payments

Number Years Specified	Amount of Each Annual Instalment	or Amount of Each Semi-Annual Instalment	Number Years Specified	Amount of Each Annual Instalment	or Amount of Each Semi-Annual Instalment
1	$1,000.00	$504.34	16	$79.88	$40.38
2	508.60	256.54	17	76.38	38.60
3	344.86	173.98	18	73.26	37.02
4	263.04	132.72	19	70.48	35.62
5	214.00	107.98	20	67.98	34.38
6	181.32	91.52	21	65.74	33.24
7	158.02	79.76	22	63.70	32.22
8	140.56	70.96	23	61.86	31.28
9	127.00	64.12	24	60.16	30.44
10	116.18	58.66	25	58.62	29.66
11	107.34	54.22	26	57.20	28.94
12	99.98	50.50	27	55.90	28.28
13	93.78	47.38	28	54.68	27.68
14	88.48	44.70	29	53.56	27.12
15	83.90	42.40	30	52.54	26.60

When Policy Becomes Payable	Fixed Period of 20 Years	Fixed Period of 10 Years	When Policy Becomes Payable	Fixed Period of 20 Years	Fixed Period of 10 Years	When Policy Becomes Payable	Fixed Period of 20 Years	Fixed Period of 10 Years
10 and under	$43.24	$44.46	33	$49.60	$51.68	56	$63.44	$75.18
11	43.40	44.64	34	50.04	52.22	57	64.00	76.88
12	43.58	44.82	35	50.52	52.78	58	64.54	78.66
13	43.76	45.02	36	51.00	53.38	59	65.04	80.50
14	43.94	45.22	37	51.50	54.02	60	65.50	82.38
15	44.14	45.44	38	52.02	54.68	61	65.92	84.30
16	44.34	45.66	39	52.56	55.38	62	66.30	86.28
17	44.54	45.90	40	53.14	56.14	63	66.64	88.28
18	44.78	46.14	41	53.72	56.92	64	66.94	90.30
19	45.06	46.40	42	54.32	57.74	65	67.20	92.32
20	45.24	46.68	43	54.92	58.62	66	67.40	94.34
21	45.50	46.96	44	55.56	59.54	67	67.50	96.36
22	45.76	47.26	45	56.20	60.52	68 and over	same as 67	98.34
23	46.04	47.56	46	56.86	61.56	69		100.28
24	46.32	47.90	47	57.54	62.64	70		102.18
25	46.64	48.24	48	58.20	63.78	71		104.00
26	46.94	48.60	49	58.88	64.98	72		105.74
27	47.28	48.96	50	59.56	66.24	73		107.38
28	47.62	49.36	51	60.24	67.56	74		108.92
29	47.98	49.78	52	60.92	68.96	75		110.32
30	48.36	50.22	53	61.58	70.42	76		111.60
31	48.76	50.68	54	62.22	71.94	77		112.74
32	49.16	51.16	55	62.84	73.52			and over same as 77

Any Instalments payable under OPTION 2, or any Instalments for the fixed period of ten or twenty years, as the case may be, under OPTION 3, which shall not have been paid prior to the death of the payee, shall, unless otherwise directed in said written election, be commuted at three and one-half per centum per annum, compound interest, and paid in one sum to the executors or administrators of the payee.

In lieu of semi-annual Instalments under OPTION 2, quarterly or monthly payments thereof, and in lieu of annual Instalments under OPTION 3, semi-annual, quarterly or monthly payments thereof, in each case for proportionate parts, may be elected.

The amounts payable under the foregoing OPTIONS are based upon an assumed interest earning of three and one-half per centum per annum, but if in any year the Company shall declare for that year, upon funds held by it under such OPTIONS, a greater interest rate than three and one-half per cent., the amount payable on the next anniversary of such payments under OPTIONS 1 or 2, or under OPTION 3 within the fixed period of ten or twenty years, as the case may be, shall be increased accordingly.

When so directed in the said written election, but not otherwise, the supplementary contract hereinafter provided for, on legal release thereof, may be surrendered for the amount so retained by the Company, with any accrued interest under OPTION 1, or for the commuted value of any stipulated Instalments yet to be paid under OPTION 2, or for the commuted value of any unpaid Instalments for the fixed period of ten or twenty years, as the case may be, then remaining unpaid under OPTION 3; such commutation under OPTION 3 shall, however, in nowise operate as to payments conditional upon the payee surviving the term during which the instalments certain would have been payable. Such commuted value under either OPTION 2 or 3 shall be the amount calculated by the Company on the basis of compound interest at the rate of three and one-half per centum per annum. A payee who has not, by virtue of the terms of said written election, the right to surrender the supplementary contract may not assign or encumber such contract or any payment thereunder.

Election of any of the foregoing OPTIONS must be made in writing, addressed to the Company at its Home Office, and may be made (*a*) prior to the death of the Insured, by the Insured and the Beneficiary jointly, or, if the right to change the beneficiary has been reserved, then by the Insured alone; or, (*b*) if there is no such election on file with the Company at the time of the death of the Insured, then such election may be made by the beneficiary. In no event, however, will any of the foregoing modes of settlement be available if the Policy is assigned and any assignment will nullify any prior election.

No election shall be effective which shall purport to require any Interest or Instalment payment to be made by the Company in a sum less than $10.

Optional settlements may not be elected under a Policy which is payable to a corporation, co-partnership or association.

In case one of the foregoing optional modes of settlement is selected, this Policy must be surrendered, at the time of settlement, whereupon a supplementary contract will be issued by the Company for the OPTION elected, such supplementary contract to be dated as of the date of the Insured's death, or, where this Policy matures as an Endowment, as of the date of maturity.

NOTICE TO POLICYHOLDER

PLEASE READ YOUR POLICY PROMPTLY UPON ITS RECEIPT

Do not fail to notify the Company at its Home Office, when you change your address.

When writing District Office
or the Home Office give your Policy Number and state clearly Name, Residence, County and State.

THE COMPANY'S AGENTS
have no authority to waive forfeitures, to alter or amend this Policy, to accept premiums in arrears or to extend the due date of any premium.

Checks, Drafts or Money Orders
in payment of premiums should be drawn to the order of Metropolitan Life Insurance Company.

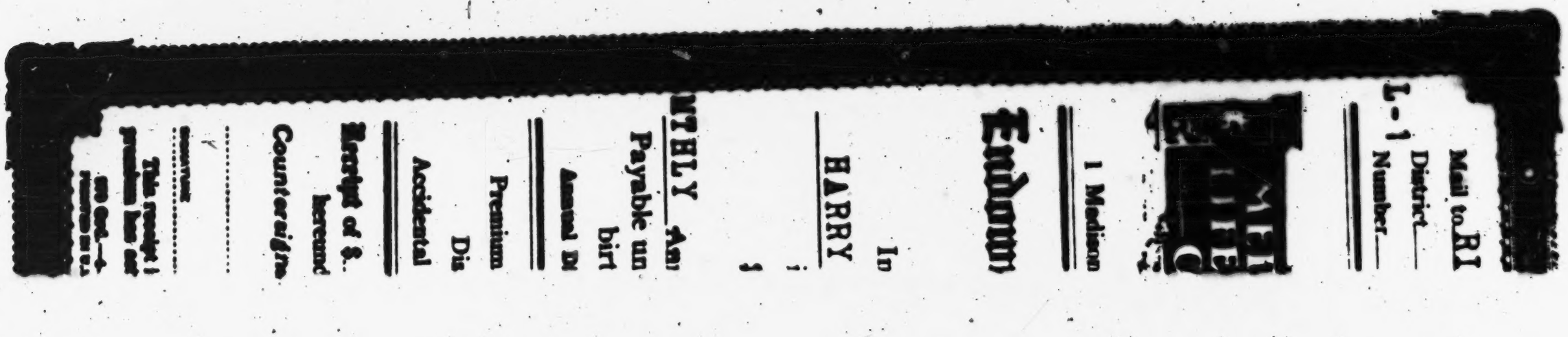
Privilege of voting for Directors.
An election of Directors of the Company is held in New York on the second Tuesday in April of every odd-numbered year. The holder of this Policy, after one year from its date, while it remains in force, will have a right to vote either in person or by proxy or by mail. For particulars as to how to vote, apply to the Secretary, No. 1 Madison Avenue, New York City.

In the event of the death of the Insured,
the Claimant should promptly advise the Home Office, in New York, or the District Office through which premium payments have been made. Pay nothing to any representative of the Company for preparation of claim papers. Deliver the Policy only to the Company's representative. The Company is glad to pay and there is no necessity for help or alleged influence in collecting.

It is not necessary to employ an attorney or any other person to collect the insurance under this Policy, or to secure any of the benefits it provides.

Premium Payments are invalid
unless made in exchange for an official Home Office receipt signed by the President, Vice-President, Actuary, Treasurer or Secretary of the Company and properly countersigned.

Premium Payments, Proofs of Claim, Notice of Change of Beneficiary, etc.,
may be made at the Pacific Coast Head Office in San Francisco, California, if so preferred.



This policy has been assigned to the
METROPOLITAN LIFE INSURANCE COMPANY
FEB 27 1933

Mail to RITTENHOUSE, PA.

L-1 District

Number 6641296- A

METROPOLITAN LIFE INSURANCE COMPANY

1 Madison Avenue, New York, N. Y.

Endowment at Age 85 Policy

Insuring the Life of

HARRY J. ALKER JR.

in the amount of

$ 50,000

for

MTHLY Annual Premium of $ 158.00

Payable until anniversary nearest 85th birthday or prior death.

Annual Distribution of Divisible Surplus

Premiums for Supplementary Contract

Disability Provision $ -

Accidental Death Provision $ -

Receipt of $ 158.00, the first premium hereunder, is hereby acknowledged.

Countersigned

19

NOV. 1, 30

REGISTER OF CHANGES OF BENEFICIARY

NOTE—No change of Beneficiary shall take effect unless endorsed on this Policy by the Company at the Home Office.

Date of Endorsement	New Beneficiary Designated	Right of Insured to change the Beneficiary	Endorsed by
Nov. 5, 1930	Estate of the Insured	Yes	[illegible]

PLAINTIFFS' REQUEST FOR FINDINGS

The learned trial Judge is respectfully requested to find as follows:

1. The evidence being that defendant borrowed from Alfred A. DuBan, the late husband of Mamie DuBan, the plaintiff's decedent, 4,400 shares of common stock of the National Dairy Products Corporation, to be returned on demand, and that defendant returned 2,475 of said shares or the equivalent thereof, but admittedly has failed to return the remaining 1,925 shares, and the claim against the defendant for the unreturned shares having been duly assigned to the plaintiffs' decedent in the distribution of her husband's estate, the plaintiffs are entitled to recover from the defendant the sum of $126,087.50 the admitted market value of said 1,925 shares on March 8, 1954, the date on or before which defendant was called upon to return said shares in plaintiffs' letter of demand dated February 24, 1954, with interest thereon from March 8, 1954.

2. The defendant was legally bound to pay to the plaintiffs' decedent sums equivalent to the dividends declared and paid from time to time on the shares of common stock of the National Dairy Products Corporation which she would have received on the 1,925 shares of stock had the defendant returned the same to her and the defendant did make such payments to the plaintiffs' decedent until the time of her decease on November 8, 1953, which was a recognition and acknowledgment of his obligation to return said stock to her.

3. As the defendant was legally bound to pay to the plaintiffs' decedent sums equivalent to the quarterly dividends on the unreturned shares of National Dairy Products the agreement alleged by defendant to

have been entered into by him and Mamie DuBan, that if defendant would pay to her each quarter an amount equal to the dividend she would have received on the unreturned stock so long as she lived the plaintiff upon her death would be under no obligation to return any stock then unreturned was without any consideration and consequently of no force or effect even if the evidence would warrant a finding that such an oral agreement was entered into between said parties.

4. The plaintiffs are entitled to recover from the defendant the sum of $1,443.75, being an amount equivalent to the dividend of 75¢ per share on 1,925 shares of unreturned common stock, declared and paid by the National Dairy Products Corporation on December 10, 1953, with interest thereon from said date.

5. Under all of the evidence in this case your finding must be for the plaintiffs.

Respectfully submitted,

EDWIN BOOTH,
BENJAMIN H. HELLMAN,
Attorneys for Plaintiffs.

DEFENDANT'S POINTS.

1. Under all the evidence in this case, the verdict of the Court should be for the defendant.

2. Under all the evidence in this case, the verdict of the Court should be for the defendant on the defendant's Counterclaim in the amount of $29,000.05 with interest from November 8, 1953.

JOHN J. GILBRIDE, JR.,
ISADORE BAYLSON,
Attorneys for defendant.

OPINION.

MacNeille, *P.J.*, July 10th, 1956

This is an action in assumpsit brought by the executors of the estate of Mamie DuBan, deceased, to recover from the defendant the value of 1,925 shares of the common stock of National Dairy Products Corporation and the amount of a dividend declared and paid thereon, plus interest. The facts disclosed by the pleadings and in the hearing before the court, sitting without a jury, may be summarized as follows:

In 1930 and 1931 the defendant, who was a close personal friend and legal adviser of Alfred A. DuBan, the husband of Mamie DuBan, borrowed from Alfred A. DuBan 4,400 shares of National Dairy Products Corporation common stock, giving to Mr. DuBan written evidence of his obligation to return the stock, and delivering to Mr. DuBan as collateral security an insurance policy on the defendant's life in the sum of $50,000 and a certificate for 125 shares of the stock of Mrs. Smith's Pie Company registered in the defendant's name and assigned by the defendant in blank. The Dairy company stock was, with Mr. DuBan's knowledge and consent, deposited with the Integrity Trust Company as collateral for loans made by that company to the defendant. It remained in Mr. DuBan's name, and all dividends declared on it were paid directly to Mr. DuBan, throughout his lifetime.

Mr. DuBan died on November 12, 1938. His wife, Mamie DuBan, was executrix and sole beneficiary under his will. The defendant continued to act as her legal adviser until her death on November 8, 1953. She received directly all dividends paid on the Dairy company stock until 1942. Some time in that year the 4,400 shares of Dairy company stock were transferred to the Federal Deposit Insurance Corporation,

the assignee of Integrity Trust Company. Thereafter the defendant delivered to Mrs. DuBan from time to time certificates of Dairy company stock aggregating 2,475 shares, and, commencing December 24, 1942, the defendant paid to Mrs. DuBan amounts equivalent to all dividends as they were declared and paid on the unreturned Dairy company stock until the time of her death.

On April 12, 1946, Mrs. DuBan, as executrix of her husband's estate, executed a paper prepared for her by the defendant assigning to herself individually the claims of the estate against the defendant and others, "together with all interest of the estate in the Metropolitan Life Insurance policy assigned as collateral." The insurance policy, the premiums on which had been paid by the defendant, together with the certificate for 125 shares of Mrs. Smith's Pie Company stock, were found among Mrs. DuBan's effects after her death.

On December 10, 1953, shortly after Mrs. DuBan's death, the Dairy company declared and paid a dividend which on the 1,925 shares unreturned amounted to $1,443.75. No equivalent payment was made by the defendant to Mrs. DuBan's estate, nor did he return the remaining 1,925 shares of stock, although formal demand thereafter by March 8, 1954, and for the dividend payment, was made by Mrs. DuBan's executors on February 24, 1954. This suit followed, claiming the $1,443.75 dividend and the admitted value of 1,925 shares of Dairy company stock as of the date of the demand, namely, $126,087.50 plus interest.

The defense is one of confession and avoidance. The defendant admits the foregoing facts but asserts that during her lifetime Mrs. DuBan agreed with him that in return for his agreement to forego charging her and her husband's estate for legal services she would not require him to return to her the 1,925 shares

of Dairy company stock and that she would return to him the insurance policy and the Pie company stock, provided he would continue to pay her the equivalent of all dividends paid on the Dairy company stock during her lifetime. The defendant also sets up a counterclaim, in the alternative, for legal services, costs, etc., of $50,615.40, and claims that the value of the 1,925 shares of Dairy company stock, if he is now liable therefor, should be determined as of the time of its original loan, namely, $13.62½ per share, or $26,228.13. Allowing interest on this value at six per cent yearly and demanding credit for alleged dividend payments in excess thereof, the defendant claims a net amount presently due him from Mrs. DuBan's estate of $29,000.05.

The issues thus presented all involve the asserted defense, for the evidence produced by the plaintiffs clearly established prima facie the liability of the defendant. When the case was called for trial on March 27, 1956, a plea for a continuance was made on the ground of the defendant's ill health. Out of consideration for this circumstance and respect for the opinion expressed by a medical attendant of the defendant, the court granted a continuance and gave the defendant leave to testify in deposition form in his own office, subject, of course, to objection by the plaintiffs on the ground of the defendant's incompetency. The defendant's deposition was so taken, transcribed and filed. The matter then came on for trial on April 25, 1956. In the defendant's case counsel attempted to introduce the deposition of the defendant, over the plaintiffs' objection. The objection was sustained. The defendant is clearly an incompetent witness under the act of May 23, 1887, P. L. 158, sec. 5, cl. (e), 28 P. S. 322, which provides:

> "Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic

> and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said rights of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy."

Mamie DuBan is dead, and her interest has passed to the plaintiffs. The defendant's interest is adverse to her right, and he is therefore incompetent to testify to matters which occurred in her lifetime.

Counsel for the defendant has urged strenuously that the plaintiffs waived the defendant's incompetency by addressing to him written interrogatories in advance of trial, that this conclusion follows by analogy to the line of cases holding that a surviving witness is made fully competent when he has been subjected to cross-examination on matters occurring in the decedent's lifetime. We do not agree with this contention. A party may address interrogatories to an opposite party in advance of trial, under the provisions of Pa. R. C. P. 4007, but the purpose of such interrogatories is purely that of discovery, to aid in the framing of pleadings or in preparation for trial. The answers elicited have no evidentiary weight except as subsequently introduced at the trial; and they may in no case be introduced by the party making the answers but only by the opposing party, within the limits set forth in Pa. R. C. P. 4020 relating to discovery depositions.

The brief submitted by defendant's counsel is devoted solely to this issue. It contains numerous citations of authority from other jurisdictions holding

that the introduction of the depositions of a surviving party regarding matters occurring in the lifetime of a deceased adversary waives the party's incompetency to testify at the trial generally. The rule set forth in 70 C. J. sec. 479, which is quoted in part by counsel, is:

> "The disqualification may also be removed by the reading in evidence of testimony given by the interested witness at a former trial or hearing; and it has been held that a party waives the incompetency of his adversary by taking the latter's deposition, even though, although there is authority to the contrary, he does not use it at the trial."

This we take to refer to depositions intended for use at the trial, as distinguished from discovery depositions. The Arkansas case cited by counsel, *Smith v. Clark*, 244 S. W. 2d 776 (1952), differs materially in its facts from the present case. That case held that the surviving party's incompetency had been waived when he had answered interrogatories propounded to him. The court said in its opinion:

> "These interrogatories required appellee to state how many checks were delivered to him by deceased, the persons present when the checks were given and other facts in connection with the filling in of the blanks and payment of the check. The interrogatories were attached to the complaint and the answers given thereto were attached to appellee's answer. The questions and answers, although never formally introduced, were called to the attention of the chancellor at the hearing and appellee was cross-examined at length relative to the answers given."

We are constrained to hold that the mere addressing of pretrial interrogatories to the defendant

under our rules of civil procedure, the answers to which were not introduced at the trial, does not amount to a waiver of his incompetency under the act. In this we are in agreement with the further statements contained in the section of Corpus Juris already referred to:

> "It has been held that one whose testimony taken at the hearing on a citation in the probate court is introduced by his adversary is not thereby called as a witness by his adversary, and his incompetency as a witness, outside of admissions made on such examinations, is not affected. [Merchants' L. & T. Co. v. Egan, 78 N. E. 800, 222 Ill. 494]. So the fact that a party is examined by his adversary in preliminary proceedings in probate court has been held not to operate as a waiver where the answers given were not offered in evidence in the subsequent proceedings. [In re Van Volkenburgh's Adm'x, 172 N. E. 269, 254 N. Y. 139; Percy v. Miller, 197 P. 638, 115 Wash. 440.]"

See also *DeLamoral v. Townsend*, 152 N. E. 699, 243 N. Y. 430 (1926); *Petition of Jennings*, 286 App. Div. 256, 143 N. Y. Supp. 2d 386 (1955).

Accordingly, the plaintiffs' objection to the defendant's testimony regarding matters occurring prior to Mrs. DuBan's death was sustained and his deposition was excluded. Four other witnesses testified for the defendant, one by deposition and three in person, regarding conversations which they had with Mrs. DuBan during her lifetime which purported to corroborate the defendant's assertion that she had agreed that he was to keep the Dairy company stock in return for his legal services.

Alfred DuBan Bruce, a lawyer formerly associated with the defendant, and a nephew of Mrs. DuBan, testified that in the fall of 1947 or 1948 he had a conversation with Mrs. DuBan in which he said to her,

"It seems to me, Aunt Mamie, that these men [referring to the defendant and others who were obligated to Mr. DuBan's estate] are men of affluence and seem to be rather well-to-do, and I can't see why they couldn't repay their loans to you if they only paid it so much per month." Mrs. DuBan's reply was, according to the witness, "Alfred, your uncle thought the world of those boys and he wouldn't want them hurt in any way. And I don't intend to hurt them."

Horace S. Rhoads, an accountant who has been employed by the defendant since 1938, devoting about one-quarter of his time to the defendant's business, testified that he had occasion to call on Mrs. DuBan from time to time to have her sign papers in connection with her income taxes and in connection with a suit against the Federal Deposit Insurance Corporation for the recovery of the Dairy company stock which had been transferred to it as assignee of the Integrity Trust Company. He stated that on five or six of such visits, beginning in 1947 or 1948 and extending until 1952, Mrs. DuBan informed him that she had "settled" with the defendant and that she was going to return to the defendant his insurance policy and the Pie company stock as soon as she could get to her safe-deposit box to get them. Mr. Rhoads' specific words were, "Mrs. DuBan said she didn't see why she was being asked to sign these papers continuously as she had settled with Mr. Alker and she was no longer interested in the case. . . . She said that Mr. Alker had agreed to pay her the dividends on the 1,925 shares of stock for as long as she lived. She in turn had released any collateral she had belonging to Mr. Alker. She had released any right she had to the stock of 1,925 shares. . . . He in turn would agree to release any debts he had against Mr. DuBan or Mrs. DuBan or the DuBan family."

Mr. Rhoads testified that he had reported these conversations to the defendant, but that so far as he knew no writing was ever made confirming the settlement. His visits, he said, were always before nine o'clock in the morning, he telephoned in advance of his coming to make an appointment, the door to Mrs. DuBan's apartment was left ajar so that he admitted himself, and that he never encountered Mrs. Dunwoody, Mrs. DuBan's sister, or anyone else other than Mrs. DuBan, in the apartment.

Elva Bruce, a sister-in-law of Mrs. DuBan, testified by deposition read at the trial. She stated that in about 1947 or 1948 she visited Mrs. DuBan and had a conversation with her in which Mrs. Bruce said, "What's the matter with Harry Alker, why don't you go after him?" to which Mrs. DuBan replied, "Harry, oh, no. We have been friends for too many years. I could not do anything like that. I am cancelling his debt. . . . You know, I still hold his insurance policy, but I am going to return it to him."

Thomas J. Hookey, formerly a licensed real estate broker and associated for the past nine years with the defendant's office, testified that he visited Mrs. DuBan four or five times between 1945 and 1949 to have her sign papers in connection with her income taxes and the F.D.I.C. litigation. He stated that Mrs. DuBan said to him on several of these occasions, "I have told you before why does Mr. Alker send you up here to sign these papers when I am not interested? I have settled with him. I have told him I would give him back his stock and his insurance policy as soon as I am able to get it ~~out of~~ [this safe deposit box]"; but that she had not been able to get to the box. Mr. Hookey testified that he reported these conversations to Mr. Alker but that he knew of no writing evidencing the settlement. He never met Mrs. Dunwoody, Mrs.

DuBan's sister. When he called, the apartment door was locked and he was admitted by a maid.

Marian Alker, a sister of the defendant, who is also employed in his office, testified that in the summer of 1953, a few months before Mrs. DuBan's death, she called on Mrs. DuBan to have her sign a paper relating to the F.D.I.C. litigation. At that time the witness stated that Mrs. DuBan said to her, "I don't know why Mr. Alker bothers about this. He oughtn't to worry about this. He has done so much for me and he has done so much for my family and so much for Mr. DuBan, and I don't know why he worries about it. . . . As soon as I can get down to the box I am going to give him back his Smith Pie and his insurance papers and I am just not able to get there. He has fulfilled all his promises and he paid the interest on the stock promptly. It is always prompt. I don't like this. I want peace." This statement, Miss Alker said, had been repeated to her by Mrs. DuBan when she had visited her on prior occasions.

The burden cast on the defendant to establish the agreement which he alleges Mrs. DuBan made with him was a heavy one, particularly in view of the fact that at the time Mrs. DuBan was a woman upwards of eighty years of age, of impaired health, and to whom the defendant stood in the relation of a long-time trusted legal adviser. We do not think he has met that burden. His witnesses did not impress the court favorably by their manner of testifying, nor did their testimony carry conviction, especially in view of apparent inconsistencies with facts established in the plaintiff's proofs. Mrs. DuBan, according to the defendant's version, often expressed the intention of returning to the defendant the insurance policy and the Pie company stock when she would be able to get to her safe-deposit box to get them; yet there is clear evidence that during the period in question Mrs. Du-

Ban visited her bank and had access to the box frequently. Moreover, there is no evidence that the policy was ever in the box. On the other hand, after her death the policy and the assignment of the Pie company stock were found among her effects in her apartment, and the Pie company stock itself in the safe-deposit box.

There is testimony from the defendant's side placing the alleged conversations with Mrs. DuBan regarding her agreement with the defendant as early as 1945; yet in 1947 the defendant wrote to Miss Loevner, Mrs. DuBan's secretary, asking if he could borrow the insurance policy for the purpose of effecting a bank loan to pay off the existing loan which was against the policy, thereby saving himself something in interest charges. On December 10, 1948, the defendant wrote to Mrs. DuBan saying, "I hope one of these days Miss Loevner will be able to come in and sit down and determine just how many shares of National Dairy are coming to you." On August 12, 1949, he wrote stating that he was arranging to make quarterly premium payments instead of monthly, and asking Mrs. DuBan to indicate her approval by initialing a form supplied for that purpose.

Mrs. Dunwoody, Mrs. DuBan's sister, who shared the apartment with Mrs. DuBan during the last ten years of her life, testified that she never saw Mr. Rhoads at the apartment and that the apartment door was always kept securely fastened, whereas he had stated that he always found the door ajar on his arrival. Mrs. Dunwoody did see Miss Alker and Mr. Hookey at the apartment and was present during their conversations with Mrs. DuBan, but she never heard Mrs. DuBan make the statements which they attributed to her.

The court is thus left with no evidence from the defendant himself, since under the circumstances here

tofore outlined he is an incompetent witness to matters occurring before Mrs. DuBan's death, and with evidence from corroborating witnesses which the court regards as largely unworthy of belief and in any event not sufficient to overcome the plaintiffs' prima facia case. No evidence was presented by the defendant to support his counterclaim. Judgment must therefore be given for the plaintiffs.

The plaintiffs are entitled to the return of 1,925 shares of the common stock of National Dairy Products Corporation borrowed by the defendant and returnable on demand. They are also entitled to all dividends declared and paid on such stock during its retention by the defendant. The liability of the defendant became fixed at the effective date of the demand for the return of the stock, namely, March 8, 1954, at which time the market value was $126,087.50. He is also liable to the plaintiffs for the dividend payable on 1,925 shares as of December 10, 1953, amounting to $1,443.75. Interest on the former amount from March 8, 1954, to the date of the trial has been calculated at $16,139.20, and interest on the latter amount from December 10, 1953, to the date of trial at $205.97. Accordingly, the court enters the following

FINDING

And Now, this 10th day of July, 1956, 3:30 P. M. the court finds for the plaintiffs and against the defendant in the sum of $143,876.42.

By THE COURT,

RAYMOND MACNEILLE, *P. J.*

DEFENDANT'S EXCEPTIONS TO FINDINGS OF COURT.

And Now, to wit, July 13, 1956, defendant by his attorneys excepts to the findings of the Trial Judge, sitting without a jury, in the above entitled case, and assigns the following reasons:

1. The Trial Judge erred in not affording the defendant due process of law in refusing a motion for continuance of the trial.

2. The Trial Judge erred in not affording the defendant due process of law and opportunity to support his counter-claim.

3. The Trial Judge erred in finding as follows:

"Sometime in that year the 4,400 shares of Dairy company stock were transferred to the Federal Deposit Insurance Corporation, the assignee of Integrity Trust Company."

4. The Trial Judge erred in finding as follows:

"Thereafter the defendant delivered to Mrs. DuBan from time to time certificates of Dairy company stock aggregating 2,475 shares."

5. The Trial Judge erred in finding as follows:

"The insurance policy, the premium on which had been paid by the defendant, together with the certificate for 125 shares of Mrs. Smith's Pie Company stock, were found among Mrs. DuBan's effects after her death."

6. The Trial Judge erred in finding as follows:

"And gave the defendant leave to testify in deposition form in his own office, subject, of course, to objection by the plaintiffs on the ground of the defendant's incompetency."

7. The Trial Judge erred in finding as follows:

"Counsel for the defendant has urged strenuously that the plaintiffs waived the defendant's incompetency by addressing to him written interrogatories in advance of trial, that this conclusion follows by analogy to the line of cases holding that a surviving witness is made fully competent when he has been subjected to cross-examination on matters occurring in the decedent's lifetime. We do not agree with this contention."

8. The Trial Judge erred in finding as follows:

"But the purpose of such interrogatories is purely that of discovery, to aid in the framing of pleadings or in preparation for trial."

9. The Trial Judge erred in finding as follows:

"And they may in no case be introduced by the party making the answers but only by the opposing party, within the limits set forth in Pa. R. C. P. 4020 relating to discovery depositions."

10. The Trial Judge erred in finding as follows:

"This we take to refer to depositions intended for use at the trial, as distinguished from discovery depositions."

11. The Trial Judge erred in finding as follows:

"We are constrained to hold that the mere addressing of pretrial interrogatories to the defendant under our rules of civil procedure, the answers to which were not introduced at the trial, does not amount to a waiver of his incompetency under the act."

12. The Trial Judge erred in finding as follows:

"Accordingly, the plaintiffs' objection to the de-

prior to Mrs. DuBan's death was sustained and his deposition was excluded."

13. The Trial Judge erred in finding as follows:

"The burden cast on the defendant to establish the agreement which he alleges Mrs. DuBan made with him was a heavy one, particularly in view of the fact that at the time Mrs. DuBan was a woman upwards of eighty years of age, of impaired health, and to whom the defendant stood in the relation of a long-time trusted legal adviser. We do not think he has met that burden."

14. The Trial Judge erred in finding as follows:

"His witnesses did not impress the court favorably by their manner of testifying, nor did their testimony carry conviction, especially in view of apparent inconsistencies with facts established in the plaintiffs' proofs."

15. The Trial Judge erred in finding as follows:

"The court is thus left with no evidence from the defendant himself, since under the circumstances heretofore outlined he is an incompetent witness to matters occurring before Mrs. DuBan's death."

16. The Trial Judge erred in finding as follows:

"And with evidence from corroborating witnesses which the court regards as largely unworthy of belief and in any event not sufficient to overcome the plaintiffs' prima facie case."

17. The Trial Judge erred in finding as follows:

"No evidence was presented by the defendant to support his counter-claim."

18. The Trial Judge erred in finding as follows:

"Judgment must therefore be given for the plaintiffs."

19. The Trial Judge erred in finding as follows:

"The plaintiffs are entitled to the return of 1,925 shares of the common stock of National Dairy Products Corporation borrowed by the defendant and returnable on demand."

20. The Trial Judge erred in finding as follows:

"They are also entitled to all dividends declared and paid on such stock during its retention by the defendant. The liability of the defendant became fixed at the effective date of the demand for the return of the stock, namely, March 8, 1954, at which time the market value was $126,087.50.

21. The Trial Judge erred in finding as follows:

"He is also liable to the plaintiffs for the dividend payable on 1,925 shares as of December 10, 1953, amounting to $1,443.75.

22. The Trial Judge erred in finding as follows:

"Interest on the former amount from March 8, 1954, to the date of the trial has been calculated at $16,139.20, and interest on the later amount from December 10, 1953, to the date of trial at $205.97."

23. The Trial Judge erred in refusing defendant's request for finding as follows:

"1. Under all the evidence in this case, the verdict of the Court should be for the defendant.

2. Under all the evidence in this case, the verdict of the Court should be for the defendant on the defendant's Counterclaim in the amount of $29,000.05 with interest from November 8, 1953."

24. The Trial Judge erred in failing to afford the defendant due process of law.

25. The Trial Judge erred in refusing the defendant's offer to introduce into evidence Plaintiffs' Interrogatories and Defendant's Answer thereto.

26. The Trial Judge erred in refusing defendant's offer of defendant's depositions.

27. The Trial Judge erred in finding that all of defendant's witnesses lacked credibility.

28. The Trial Judge erred in finding as follows:

"And Now, this 10th day of July, 1956, the court finds for the plaintiff and against the defendant in the sum of $143,876.42."

John J. Gilbride, Jr.,
Attorney for Defendant.

DEFENDANT'S ADDITIONAL EXCEPTIONS TO FINDINGS OF COURT.

And Now, to wit, July 14, 1956, the defendant, by his attorney, excepts to the findings of the Trial Judge, sitting without a jury in the above entitled case, and assigns the following additional reason:

The defendant reserves unto himself, the right to file such additional exceptions to the findings of the Court in the above case, until such time as Isidore Baylson, Esq., Associate Counsel of record for the defendant shall recuperate from his illness.

John J. Gilbride, Jr.,
Attorney for Defendant

ORDER
SUR PETITION FOR NEW TRIAL BECAUSE OF AFTER-DISCOVERED EVIDENCE.

And Now, February 21, a rule is allowed on the within named plaintiffs to show cause why the prayer of the within petition should not be allowed:

Rule returnable March 11, 1957, at 10 o'clock, A. M., in Room F 285, City Hall, Philadelphia, Pa.

All proceedings in the meantime to stay.

MILNER, *J.*

PETITION.

To the Honorable the Judges of the Said Court:

The petition of HARRY J. ALKER, JR.,
RESPECTFULLY REPRESENTS:

1. That your petitioner is the defendant in the above matter.

2. That the above matter was tried before your Honorable Court, MacNeille, P. J., on April 25, 1956, and April 26, 1956, without a jury, and a verdict entered against the defendant on July 10, 1956.

3. That by reason of several operations he had already undergone and the one he after the trial underwent, and the after-effects thereof, defendant was unable to properly assist his counsel in the presentation of the said case and furnish them with all the information in connection therewith, or take part therein.

4. That he has recovered from his illness and since the decision in the above matter secured and furnished counsel with the Orphans' Court record in the above estate in which the said Court by its adjudication dated November 26, 1954, (excerpts of which are quoted in the appendix to the defendant's brief in support of exceptions) gave leave to the Executors to transfer and assign to Florence Fisher Dunwoody (decedent's sister and one of the plaintiffs herein) and to Dorothy Dunwoody Nerlinger, shares of various stocks for which the decedent had executed assignments to them as gifts to said persons. The same were not to be registered in the names of the said donees on the books of the corporation thus providing that the dividends thereon were to come to decedent so long as she lived. Your Honorable Court's attention is called to the fact that the said Orphans' Court stated that the adjudication was in accordance with the statements and

stipulations signed by Edwin Booth, attorney for the accountants herein, who are the plaintiffs herein.

Your petitioner alleges that the decedent's method of handling said transactions confirmed decedent's plan on her part to secure to herself merely the income from her assets as long as she lived.

5. That this confirms the testimony of defendant and his witnesses that the decedent was, when she made the settlement with the defendant, only interested in securing as long as she lived the dividends from the National Dairy Products Corporation stock involved in the transaction, and that all other matters between them were settled, except, if any of the DuBan stock was recovered in the Federal Deposit Insurance Corporation suit, she was to get that.

6. Furthermore, that the plaintiffs know that their claim against your petitioner is without merit is confirmed by their conduct before the Commissioner of Internal Revenue in connection with the federal estate tax in this estate—said Executors having advised the Commissioner that the alleged claim was without value and should be treated as worthless and without value, and the Commissioner has so found, as will appear by the letter addressed by the attorneys for the Executors to the various parties in interest. (See Exhibit "A").

7. That the federal estate tax was settled by plaintiffs with the Commissioner on that basis.

8. That the said plaintiffs could not truthfully make said allegation if they believed the alleged claim in this suit had value, because they claimed in this suit that they had certain collateral for the obligation. This is the collateral defendant claims plaintiffs' decedent had agreed in the settlement to return to the defendant when she went to her box, which had not yet been done.

9. That their action in connection with the Federal estate tax confirms the fact that the claim herein by plaintiffs is without foundation.

10. That the above information has only recently been discovered, the first information with reference thereto being contained in a letter addressed to one of the beneficiaries who happened to be a client of defendant; a copy of which letter is hereto attached and made part hereof as Exhibit "A".

11. That the verdict or finding of the Court should be set aside and a new trial granted so that the defendant might introduce evidence as to the above as well as such other evidence as he is now physically able to produce.

Your petitioner therefore prays that the aforesaid verdict or finding be set aside and a new trial granted so that the defendant might introduce evidence as to the above as well as such other evidence as he is now physically able to produce.

And your petitioner will ever pray &c.

Harry J. Alker, Jr.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.

Harry J. Alker, Jr., being duly sworn according to law deposes and says that he is the petitioner above-named, and that the facts set forth in the foregoing petition are true and correct.

HARRY J. ALKER, JR.

Sworn to and subscribed before me this 31st day of January, 1957.

J. J. BUCHMAN,
Notary Public.

(Seal)

My commission expires 2 1 57.

EXHIBIT A.

EDWIN BOOTH
Girard Trust Building
Philadelphia

November 9, 1956.

Re: Estate of Mamie DuBan, deceased

Edwin E. Ford, Jr., and Mollie Lay
Executors under the will of Gertrude Ford, Dec'd.
c/o Harry J. Alker, Jr., Esq.
1505 Land Title Building
Philadelphia 10, Pa.

Dear Sir and Madam:

After many conferences the Internal Revenue Agent insisted upon including in the gross estate for Federal estate tax purposes the claim of the DuBan Estate against Harry J. Alker, Jr., at $127,533.25, the full face amount thereof and filed his report recommending the assessment of a deficiency in tax in the amount of $74,194.38.

To this action a protest was filed by the Executors and after several conferences with the Technical Staff of the Department, the filing of affidavits, etc., a compromise settlement is now proposed under which the claim against Mr. Alker will not be included in the gross estate at any valuation with the understanding that if and when any recovery is ultimately made from Mr. Alker, the estate or the beneficiaries, depending upon when recovery is made and distributed to the beneficiaries, the amount of any such recovery shall be treated and taxable as a long term capital gain.

Upon the proposed settlement, which is subject to the approval of the Commissioner of Internal

Revenue at Washington, D. C., the proposed deficiency in tax will be reduced from $74,194.38, to $31,472. of which $18,000. has heretofore been paid on account as shown by the Executors' Second Account. The remaining deficiency results principally from certain transfers made by the decedent in her lifetime, as to the taxability of which there now seems to be little question.

It is necessary that a paper in the enclosed form be signed by all of the beneficiaries and it is advisable that the matter be brought to a conclusion as early as possible. Please, therefore, kindly sign all three copies of the enclosed and return the same to me promptly.

As soon as the proposed compromise settlement is approved by the Commissioner of Internal Revenue a further distribution will be made to the beneficiaries.

Very truly yours,

(Sgd) Edw. Booth

EB:CL

enc.

MOTION TO DISMISS DEFENDANT'S PETITION AND RULE FOR NEW TRIAL.

And Now, March 5, 1957, come the plaintiffs, Girard Trust Corn Exchange Bank and Florence Fisher Dunwoody, Executors under the Will of Mamie DuBan, deceased, and move the Court to dismiss the defendant's petition and rule for a new trial for the following reasons:

1. That under C. P. Rule *270(d) motions (or rules) for a new trial have been abolished in non jury cases and there is therefore no legal warrant or authority for the defendant's petition and rule for a new trial.

2. The matters set forth in the defendant's petition were presented to the Court en banc upon the argument of the defendant's exceptions to the findings of the Trial Judge.

3. The matters set forth in the defendant's petition with respect to the alleged ill health of the defendant were considered by the Trial Judge on March 27, 1956, when the case was fixed for trial after a hearing at which testimony was taken in support of the defendant's application for a continuance upon this ground and his motion refused. The matter is also covered by the defendant's exceptions to the findings of the Trial Judge, particularly exceptions Nos. 1 and 6.

4. The defendant's petition does not set forth any after discovered evidence which would legally afford the basis of a new trial, all of the alleged after discovered evidence being wholly immaterial and irrelevant to the issues involved.

5. The exhibit attached to the defendant's petition does not support [illegible]

tiffs advised the Commissioner of Internal Revenue that the plaintiffs' claim against the defendant should be treated as "worthless and without value", but on the contrary said exhibit merely refers to the manner in which any recovery against the defendant should be treated for tax purposes when made.

6. The defendant did not serve upon the plaintiffs or their attorney a copy of the petition and rule for a new trial within forty-eight hours after filing as required by C. P. Rule *327(a) and no copy thereof has been served upon the plaintiffs or their attorneys up to the present time notwithstanding the fact said petition and rule were filed on February 20, (or 21), 1957.

EDWIN BOOTH,
Attorney for Plaintiffs.

ANSWER OF PLAINTIFFS TO PETITION OF DEFENDANT FOR A NEW TRIAL BECAUSE OF AFTER-DISCOVERED EVIDENCE.

1. Admitted.

2. Admitted.

3. Demand was made on defendant to deliver the 1925 shares of common stock of National Dairy Products Corporation, the subject matter of this litigation, or on before March 8, 1954, and shortly after that date the present suit was instituted. The case was listed seven times before the listing of March 21, 1956, and was continued at least five times on the application of the defendant on the ground of his illness. On March 27, 1956, there was another application by defendant for a continuance on the ground of his illness, his physician was examined in open court and the court granted a continuance and gave the defendant leave to testify in deposition form in his own office. The depositions of the defendant were taken, transcribed and filed and the case came on for trial on April 25, 1956. The matters set forth in Paragraph 3 of defendant's petition were presented to the Court en banc upon the argument of defendants' exceptions to the findings of the trial Judge. The plaintiffs deny that the defendant by reason of any operations or illness was unable to properly assist his counsel in the preparation of the case and furnish them with all the information in connection therewith or take part therein. The true fact is that the defendant had ample time to furnish to his counsel all information available for any defense to the action, that he did furnish to his counsel all such information and did take part in the preparation for trial.

4. The statements contained in Paragraph 4 of the defendant's petition refer to gifts of stocks, form-

ing a small portion of her assets, made by the decedent to her sister and niece; and because the transfers of the stock were not registered on the books of the corporations the dividend checks were received in the name of and by the decedent. The statement that such transactions confirmed any plan on decedent's part to secure to herself merely the income from her assets as long as she lived is, therefore, untrue and false, especially in view of the fact that, exclusive of any gifts made by decedent to her sister and niece and the claim against Harry J. Alker, Jr. (always carried at unascertainable value) the decedent left an estate of over $605,000.00. The adjudication to which the defendant refers contains the following statement:

> "It is stated that the executors are holding a policy of insurance for $50,000., on the life of Harry J. Alker, Jr., and 125 shares of Mrs. Smith's Pie Company in connection with a claim against him for some $127,000., for which suit is pending in Court of Common Pleas No. 1, March Term, 1954, No. 973. Neither the life insurance policy nor the stock appears in the executors' account as an asset of decedent's estate and, therefore, are not involved in the distribution. The claim against Mr. Alker is included in the account at in unascertained value.
>
> Mr. Alker appeared in his own behalf on October 4, 1954, and was represented by counsel at the postponed audit on October 11, 1954, but no attempt was made to have determined any claim by him arising from the life insurance policy or the stock held by the estate. It was stated (N. T. p. 2) that the parties have elected to have the controversy determined by the Common Pleas Court, or by the Orphans' Court at the audit of

the next accounting of the executors if the dispute has not been determined by that time by the Court of Common Pleas (N. T. pp. 18, 19). This adjudication, therefore, is without prejudice to the rights of the parties under their agreement. See letter of Hubert J. Horan, Jr., Esq., annexed."

The plaintiffs are advised and believe and, therefore, aver that the statements contained in Paragraph 4 of the defendant's petition have no bearing upon the issue involved in the present litigation and are irrelevant and immaterial.

5. It is denied that any transactions between the decedent and her sister and her niece confirms any testimony that decedent was only interested in securing so long as she lived the dividends from the National Dairy Products Corporation involved in the present litigation between the plaintiffs and the defendant and that all matters between the decedent and defendant were settled. The plaintiffs are advised, believe and, therefore, aver that the statements contained in Paragraph 5 of the defendant's petition are irrelevant and immaterial.

6. The allegations contained in Paragraph 6 of the defendant's petition are false and untrue. The true fact is, as shown by copy of letter attached to the defendant's petition, that the Internal Revenue Agent who audited the DuBan Estate Tax Return insisted upon including in the gross estate the claim of the DuBan Estate against Harry J. Alker, Jr. at $127,533.25. A protest was filed by the plaintiffs, the Executors of the Estate, setting forth all of the facts, and a copy of that portion relating to the Alker claim is hereto attached, marked Exhibit "A" and made a part hereof. After conference with the Appellate Division of the Internal Revenue Service

a compromise was effected in October 1956, under which it was agreed that no value be placed upon the Alker claim for estate tax purposes and that the Executors and the legatees under the will enter into a collateral agreement with the Internal Revenue Service that if any recovery were made either by the Executors or legatees on the claim against Alker, the value of the claim for capital gain tax purposes would be zero. The collateral agreement (copy annexed hereto, marked Exhibit "B") was executed by the Executors and all the legatees and duly filed with the Internal Revenue Service. At no time did the plaintiffs advise the Commissioner of Internal Revenue, or any taxing authority or anyone, that the claim against Alker was without value and should be treated as worthless and the Commissioner has never so found. The plaintiffs are advised and believe and, therefore, aver that the statements contained in Paragraph 6 of defendant's petition are irrelevant and immaterial to the issue involved in the present suit.

7. The Federal Estate tax in the DuBan Estate was settled under the compromise agreement as above set forth.

8. Denied for the reasons hereinbefore set forth.

9. Denied for the reasons hereinbefore set forth.

10. Denied. Full information as to the compromise effected with the Internal Revenue Service was mailed to all legatees on November 9, 1956, one letter being to certain legatees, c o Harry J. Alker, Jr. at 1505 Land Title Building, Philadelphia 10, Pa. as shown by Exhibit to defendant's petition. The defendant was represented by William B. Allen, Isidore Baylson and A. Samuel Buchman, Esqs., at the audit of the Second Account of the Executors on February 8, 1956,

at which the claim of the estate against Alker and his alleged counter claim were brought before the auditing Judge, as will be shown by reference to the Adjudication of the Court.

11. The plaintiffs are advised and believe and, therefore, aver that the statements contained in Paragraph II of the defendant's petition are so vague and indefinite as not to require answer thereto.

12. Under C. P. Rule 270 (d) motions (or rules) for a new trial have been abolished in non jury cases and there is, therefore, no legal warrant or authority for the defendant's petition and rule for a new trial.

13. The defendant's petition does not set forth any after discovered evidence which would legally afford ground for a new trial, all of the alleged after discovered evidence being wholly immaterial and irrelevant to the issue involved.

14. The plaintiffs pray that the petition of the defendant for a new trial be denied and the rule granted discharged.

GIRARD TRUST CORN EXCHANGE BANK,
F. J. MAINWARING, Trust Officer,

FLORENCE FISHER DUNWOODY,
Executors u/w of Mamie DuBan,
deceased.

Plaintiffs.

Edwin Booth,
Attorney for Plaintiffs.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss:*

FLORENCE FISHER DUNWOODY, being duly sworn, according to law, doth depose and say that the facts set forth in the foregoing Answer are true to the best of her knowledge, information and belief.

FLORENCE FISHER DUNWOODY.

Sworn and Subscribed to before me this 29th day of March, 1957.

Sylvia R. Bellows,
Notary Public,
Philadelphia, Philadelphia County.
My Commission Expires May 23, 1960.

(Seal)

EXHIBIT "A."

(1) The claim of the estate against Harry J. Alker, Jr., in the amount of $127,333.35 which is proposed to be included in the gross estate at its face value had no fair market value on the valuation date nor does it have any at the present time. Suit for the recovery of this claim has been instituted by the Executors against Alker in the Court of Common Pleas No. 1 of Philadelphia County, March Term 1954, No. 973. The suit was instituted because the Executors were confronted with a factual situation that in their opinion rendered it necessary for them for their own protection as fiduciaries to test out the matter notwithstanding the fact that they have at all times entertained grave doubt as to the prospect of ultimate recovery. In the suit an Answer has been filed by the defendant wherein he denies all liability to the estate and sets up a Counter claim against the estate in the sum of $29,000. in which amount he alleges the estate is indebted to him. Complete copies of the pleadings in this case have been furnished to the agent from which it is apparent many complicated issues of fact and law are involved. The case has been listed for trial eight times but notwithstanding diligent efforts the Executors have not yet been successful in bringing it to trial although it is now scheduled for trial on April 25, 1956. Aside from the uncertainty of the outcome of the litigation, even if the estate succeeds in obtaining judgment against the defendant, interminable appeals and legal maneuvers will undoubtedly follow and even if the estate is ultimately successful the collectibility of any judgment which may be obtained and upheld is extremely doubtful. The Executors know of no assets of the defendant against which any judgment could be enforced other than a $50,000. life insurance policy in the Metropolitan Life Insurance Company on the

life of the defendant and 125 shares of common stock of Mrs. Smith's Pie Company which the Executors claim to hold as collateral. The ultimate value of the life insurance policy is, of course, dependent upon the continued payment of the premiums.

On November 8, 1944, the Federal Deposit Insurance Corporation obtained a judgment against Alker in the sum of $117,581.25 in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 3047, and the holders of this judgment have not yet succeeded in collecting anything on account of payment and the judgment remains unsatisfied of record. Numerous appeals, several to the United States Supreme Court, have been taken by the defendant in this litigation and a new trial is now pending.

On August 19, 1955, a United States tax lien was filed against Alker for income-tax deficiencies aggregating $972,774.25, and this lien remains unsatisfied of record. It will, of course, have priority over any judgment which may be obtained by the estate as to any assets of the defendant other than the above mentioned collateral.

It is impossible to conceive that a buyer could be found who would be winning to purchase a litigated claim of this character for more than a nominal sum.

EXHIBIT "B."

COLLATERAL AGREEMENT

In Re: Estate of Mamie ~~DuBan~~

Girard Trust Corn Exchange Bank,
et al., Executors
~~Broad~~ and Chestnut Streets,
Philadelphia 2, Penn ylvania

Date of Death: November 8, 1953

The undersigned beneficiaries of the Estate of Mamie DuBan, deceased, in consideration of the acceptance by or on behalf of the Commissioner of Internal Revenue of the proposal made for settlement of the estate tax liability of the said estate, hereby agree:

That the basis for Federal income tax purposes in computing gain or loss on sale, recovery or other disposition of the claim against Harry J. Alker, Jr., is zero ($0.00).

ORDER.

And Now, this 7th day of June, A. D. 1957, it is ordered that the above named defendant take depositions in support of his petition and rule for a new trial within 15 days from the date hereof in accordance with Pa. R. C. P. 209, otherwise all averments of fact responsive to the petition and properly pleaded in the plaintiffs' answer shall be deemed admitted for the purpose of the rule.

By THE COURT,
R. MacNeille, *P. J.*

OPINION SUR EXCEPTIONS TO FINDINGS OF COURT.

Before: WATERS, *J.*
MILNER, *J.*
MACNEILLE, *P. J.*

MACNEILLE, *P. J.*, July 3rd 1957

We are considering twenty-eight exceptions of the defendant to the findings of the court in favor of the plaintiffs in this assumpsit action. The trial judge heard the matter without a jury and expressed his findings in an eleven page opinion. We shall consider the defendant's exceptions as he has topically grouped them. It is unnecessary to repeat the factual background which is sufficiently expressed in the original opinion.

The defendant contends (exceptions 1, 2 and 24) that he was not afforded due process of law because the trial judge refused his request for further continuance on March 27, 1956. The events are properly set forth in the trial judge's opinion as follows:

> "When the case was called for trial on March 27, 1956, a plea for continuance was made on the ground of the defendant's ill health. Out of consideration for this circumstance and respect for the opinion expressed by a medical attendant of the defendant, the court granted a continuance and gave the defendant leave to testify in deposition form in his own office, subject, of course, to objection by the plaintiffs on the ground of the defendant's incompetency. The defendant's deposition was so taken, transcribed and filed. The matter then came on for trial on April 25, 1956."

It may therefore be noted that in actual effect the defendant was granted a continuance of one month. The depositions began on March 28, 1956 and were

continued at the defendant's request until April 16, 1956. There was then a further continuance at the defendant's request and the depositions were concluded on April 20, 1956. This case was called for trial after the trial date had been fixed at a preliminary call of the trial list and no request for continuance was made at the time of the preliminary call: See Pa. R. C. P. 216 (c). As stated by the plaintiffs in their brief, "... prior to March, 1956, [this] case had been listed for trial at least seven times and the defendant on the ground of illness or other cause had procured continuances". We may briefly note that the complaint was filed on March 9, 1954 and the action involved serious and substantial allegations with regard to a member of the bar of this court. Although an attorney does not by virtue of such office forfeit any of his rights as a litigant, we are of the opinion that his conduct should be most carefully scrutinized and he should be prevented from using his skills to procure interminable delays in the disposition of litigation against himself. In this case we are fully satisfied, without reference to personalities, that the matter was ripe for disposition; that any further delay was not in the interest of justice. The grant or refusal of a continuance is a matter within the reasonable discretion of the trial judge: *Anderson v. Guerrein Sky-Way Amusement Co.*, 346 Pa. 80 (1943); *McVernie v. W. S. Peace, Inc.*, 344 Pa. 24 (1942); *State Board of Medical Education and Licensure v. Williams*, 172 Pa. Superior Ct. 448 (1953); and we are satisfied that there was no abuse of discretion by the trial judge.

The second contention (exceptions 7, 8, 9, 10, 11, 12, 15, 17, 23, 25 and 26) presented by the defendant is that the plaintiffs waived the defendant's incompetency under the Act of May 23, 1887, P. L. 158, section 5, cl (e), 28 P. S. 322, by addressing written inter

rogatories to him prior to trial. The question was considered by the trial judge at length and we agree with both his conclusion and his reasoning and no useful purpose is to be served by restating the views already expressed in the original opinion. The defendant contends that the interrogatories "were for all practical reasons depositions," but we cannot understand this contention. The interrogatories were interrogatories: they were not depositions. Insofar as the defendant first suggests that we transmute interrogatories into depositions and then cites numerous cases from other jurisdictions involving depositions, it is sufficient to note that we cannot treat the address of interrogatories as the taking of depositions. It is unnecessary to express any opinion on the question of possible waiver of incompetency by the taking of depositions.

Exceptions 14, 16 and 27 are directed to the court's findings on the credibility of the defendant's witnesses. We most certainly are not disposed to interfere with the trial judge's resolution of the issues of credibility and from our review of the record we are in accord with his findings. It is sufficient to note that the finding by a trial judge sitting without a jury has the force and effect of a jury's verdict: *Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 385 Pa. 394 (1956); *Perfetto v. Lancaster Ave. B. & L. Assn.*, 353 Pa. 366 (1946); *The Bell Telephone Co. of Pa. v. Unica*, 178 Pa. Superior Ct. 308 (1955); that the trial judge's findings of fact when supported by competent and substantial evidence are conclusive and may not be arbitrarily set aside by the court en banc: *Jann v. Linton's Estate*, 150 Pa. Superior Ct. 653 (1942); *Fisher v. Congregation B'nai Yitzhok*, 177 Pa. Superior Ct. 359 (1955); *Scott Smith Cadillac Co. v. Baiocki*, 166 Pa. Superior Ct. 116 (1950); *Schaffield v. Hughes*, 166 Pa. Superior Ct. 101 (1950).

The remaining exceptions we find to be without merit. In exceptions 18, 19, 20, 21 and 22 the defendant contends that damages have been improperly assessed; that damages should be fixed as of January 20, 1943, when the Federal Deposit Insurance Corporation sold the subject stock; that any cause of action arose on that date. Defendant cites numerous authorities and cases to the effect that damages are to be fixed at the time of conversion or a reasonable period after notice thereof. The defendant's legal arguments, however, are not directed to the facts of this case. After the transfer of the 4,400 shares of stock to the Federal Deposit Insurance Corporation the defendant nevertheless continued to forward to Mrs. DuBan amounts equivalent to all dividends declared on the stock until the time of her death on November 8, 1953. Prior to that time demand was not necessary and the conversion was not attempted until death sealed the decedent's lips. Demand by the executors fixed the liability of the defendant on March 8, 1954 which was a reasonable time after notice of the defendant's disclaimer of his liability for the balance of 1925 shares of stock due to the decedent's estate.

For the foregoing reasons, we must dismiss the defendant's exceptions.

On February 20, 1957 the defendant filed a petition for a new trial on the alleged ground of after-discovered evidence. A responsive answer was filed to this petition placing at issue the factual averments set forth therein. There followed a series of delays and continuances. Finally, on May 28, 1957, the plaintiff entered a rule on defendant to proceed with the taking of depositions in accordance with the provisions of Pa. R. C. P. 209. On June 7, 1957 the court entered a formal order directing the defendant to take depositions in support of his petition and rule for new trial within 15 days, and further ordered that "otherwise

all averments of fact responsive to the petition and properly pleaded in the plaintiffs' issues shall be deemed admitted for the purpose of the rule." No depositions were taken and the matter was listed for disposition on the motion list of June 28, 1957. On that date new and eminent counsel appeared for defendant, before President Judge MacNeille and Judge Milner, and requested a further three or four day continuance for the purpose of taking depositions in support of the rule. It was obvious that a three or four day delay would have accomplished a further delay of three to four months since the court was then sitting on its final motion list prior to the summer adjournment. The request for continuance was refused. Any other disposition would have been an infringement on the plaintiffs' rights. It appeared at the argument that counsel for plaintiffs wrote to defendant or his counsel on April 12th, April 23rd and May 23rd to proceed with the taking of the depositions but there was no response. On April 29th defendant's counsel asserted that defendant's office force was swamped with tax matters; that they were working every night. We are of the opinion that defendant has deliberately and improperly delayed the disposition of this case; that he has used various devices, such as changing counsel and asserting ill health, to that end. The petition for new trial was dismissed as being without merit, and in any event failed because of the responsive denials in the plaintiff's answer.

ORDER.

And Now, July 3rd, 1957, 10:00 A. M. the defendant's exceptions to the findings of the court are dismissed; the Prothonotary is directed to enter judgment for the plaintiffs on the findings heretofore made.

By THE COURT,
Raymond MacNeille, *P. J.*

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1958.

No.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK and FLORENCE FISHER DUNWOODY, Executors under the Will of MAMIE DuBAN, Deceased,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

FRANK F. TRESCOTT,
929 Land Title Bldg.,
Philadelphia 10, Pa.,
Counsel for the Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No.

HARRY J. ALKER, JR.

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Your petitioner, Harry J. Alker, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above entitled case on March 17, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Common Pleas No. 3 for Philadelphia County[1] is unreported and is printed in the Record attached hereto,[2] (R 314a). The opinion of the Court of Common Pleas No. 3 en banc is unreported and is printed in the Record attached hereto (R 350a). The

1. This matter arose in the Court of Common Pleas No. 1 but was tried in the Court of Common Pleas No. 3 for Philadelphia County, Pennsylvania.

2. Pursuant to Rule 21(4), United States Supreme Court, Petitioner submits nine (9) copies of the record printed below and appends it hereto.

opinion of the Supreme Court of the Commonwealth of Pennsylvania printed in the Appendix hereto *infra* p. 9 is reported in 394 Pa. 47; 139 A. 2d 901. The order of the Supreme Court denying Defendant's timely filed Petition for Reargument is unreported though noted in 392 Pa. 47; 139 A. 2d 901 and is printed in the Appendix hereto *infra* p. 10.

JURISDICTION.

The Supreme Court of the Commonwealth of Pennsylvania entered judgment on March 17, 1958. Rehearing was denied on April 15, 1958, Appendix hereto *infra* p. 10.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is the Act of June 24, 1948, c. 646, 62 Stat. 869, 28 U. S. C. Sec. 1257(3).

QUESTION PRESENTED.

Is a defendant, a material witness in his own behalf, who was too ill to be present in Court to defend an action against him, the central issue of which involved the credibility of witnesses, accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States when the matter is tried without his presence in court and his testimony taken by oral deposition pursuant to court order.

THE CONSTITUTIONAL PROVISION INVOLVED.

This proceeding concerns the due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, which is printed in the Appendix hereto, *infra* p. 9.

STATEMENT OF THE CASE.

This case arose as an action in assumpsit brought by the executors of the Estate of Mamie DuBan, Deceased, to recover from Petitioner the value of 1925 shares of the common stock of National Dairy Products Corporation and the amount of certain dividends declared and paid thereon, plus interest, said shares (and accretions) purportedly the property of decedent and therefore allegedly constituting assets of the said decedent's estate.

In 1930 and 1931 Alfred A. DuBan, decedent's husband, loaned to Petitioner a total of 4,400 shares of National Dairy Products Corporation common stock, to be pledged by Petitioner with the Integrity Trust Company, a state institution, with Petitioner's loan, the last 1,000 shares having been deposited by Mr. DuBan personally with the Trust Company.

In consideration of the deposit of the last 1,000 shares of said stock with the Trust Company by him, the Trust Company extended said loan for a definite time upon certain conditions, which Petitioner has at all times kept.

As collateral to Mr. DuBan, Petitioner delivered to Mr. DuBan an insurance policy on the Petitioner's life with a maturity value of $50,000, and a certificate for 125 shares of stock in Mrs. Smith's Pie Company, duly assigned in blank.

Mr. DuBan died on November 12, 1938. Mamie DuBan, his spouse, was executrix and sole legatee under his will.

Petitioner had been legal adviser to Mr. DuBan until his death and was legal adviser to Mrs. DuBan, individually and as executrix, until her death on November 8, 1953.

Subsequently the Federal Deposit Insurance Corporation claimed it made a loan to the Integrity Trust Company and took as collateral, inter alia, the obligation of Petitioner with the collateral accompanying the same, including said 4400 shares of National Dairy Products Corporation.

Subsequently and before the maturity of the loan and without any default of payment, sold the collateral to itself. It then instituted a suit in the U. S. District Court for the Eastern District of Pennsylvania against Petitioner, Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, and the National Dairy Products Corporation.

The 4400 shares in the aforesaid litigation were transferred to the Federal Deposit Insurance Corporation over the protest of petitioner and Mamie DuBan. This litigation is pending to set aside the sale and recover the collateral with said loan.

Petitioner and Mamie DuBan, Executrix of the will of Alfred A. DuBan, deceased, were and are the parties defendant in this litigation.

From time to time, certificates of National Dairy Products Corporation stock aggregating 2475 shares on account of said 4400 shares were transferred by petitioner to Mamie DuBan.

Sometime before her death Mamie DuBan orally cancelled her claim against Petitioner for the unreturned shares aggregating 1925 shares in consideration of his cancelling all claims for services rendered to both Mr. and Mrs. DuBan during their lifetime and Mr. DuBan's estate, provided Petitioner paid Mrs. DuBan until her death regularly an amount equal to the dividends she would have received, if living. The Petitioner faithfully carried out his agreement.

On December 10, 1953, shortly after Mrs. DuBan's death, National Dairy paid a dividend in the amount of $1,443.75 on the 1925 shares in question. Mrs. DuBan having died prior to December 10, 1953, no payment was made of this dividend to her.

On October 24, 1955, Petitioner underwent extensive surgery precipitated by the perforation of a duodenal ulcer. Complications, including pneumonia; a heart condition, a bladder condition, rheumatism, bleeding from the bowels and hemorrhoids delayed post operative recovery and Pe-

titioner was hospitalized for several months and was ill for a long time after returning home.

This case was called for trial on March 27, 1956, at which time a plea for continuance was made on the ground of the Petitioner's serious illness. Dr. Ronald C. Moore, personal physician of the Petitioner, so testified before the Trial Court. Dr. Moore further testified that Petitioner was physically unable to stand trial and that to do so might prove fatal (R 51a).

The Trial Court denied a continuance but ordered the taking of Petitioner's deposition in the latter's office (48a) and upon conclusion of the deposition, proceeded with the trial in his absence (R 134a et seq.). The Trial Court, sitting without a jury, rendered a verdict against Petitioner. On Exceptions filed to the Trial Court's opinion, Petitioner raised the question of due process in the first two exceptions so filed (R 325a). The court *en banc* heard argument thereon and denied that the action of the Trial Court in denying a postponement and proceeding without the defendant constituted abuse of discretion violative of due process (R 351a).

On appeal to the Supreme Court of the Commonwealth of Pennsylvania, Petitioner again raised the question of due process. The said court rendered a per curiam affirming the Trial Court.

1. The right to notice and a hearing is a heritage of our common law protected in our jurisprudence against abuse by the federal government in the Fifth Amendment and against abuses by the state governments in Fourteenth Amendment to the Constitution of the United States. *In re Central R. Co. of New Jersey*, 136 F. 2d 633 (3d Cir. 1943); *Sexton v. Barry*, 233 F. 2d 220 (6th Cir. 1956). The fundamental requisite is the right to be heard. *Grannis v. Ordean*, 234 U. S. 385, 5 L. Ed. 1363 (1913).

The hearing must be a real one, not a sham or pretense. *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543 (1923); *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288 (1937).

Indispensable adjuncts of such a hearing in our system of jurisprudence include the right to examine adverse witnesses, to offer testimony, and to be represented by counsel. *Re William Oliver, Petitioner*, 333 U. S. 257, 92 L. Ed. 662 (1947).

That a judgment may be justified on the merits does not obviate the requirement for a fair hearing. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292; 81 L. Ed. 1093 (1937); *N. L. R. B. v. Bryan Mfg. Co.*, 196 F. 2d 477 (1952). But in any event, deprivation of life, liberty or property by adjudication must be preceded by a hearing appropriate to the nature of the case. *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 94 L. Ed. 865 (1950).

The nature of this case required the presence of Petitioner in the trial court. The intimate relationship of long standing between the Petitioner and Alfred and Mamie DuBan made the defense of any issues raised by the personal representatives of the latter without Petitioner's presence in Court a sham. It was impossible for any counsel to properly prepare, and more importantly, properly conduct cross-examination of witnesses without Petitioner. A hearing without the Petitioner's presence under these circumstances could not meet the due process requirements.

2. A Continuance for any reason is largely within the discretion of the Trial Court and a decision by the latter will be reversed only upon showing an abuse of discretion. *Harrah et al. v. Morgenthau*, 89 F. 2d 863 (D. C. Cir. 1937). But it has been consistently held that refusal to grant a continuance because of illness is reversible error where the party is a material witness and the continuance results in no serious loss to others involved. *Harrah et al. v. Morgenthau, supra; Cornwell v. Cornwell*, 118 F. 2d 396 (D. C. Cir. 1941). In those cases, affidavits of doctors were presented to the trial court in an effort to obtain contin-

nances. In the instant case below, Petitioner's medical adviser appeared and testified in open court (R49 a et seq.).

By refusing the continuance and ordering the taking of testimony by deposition, the trial court deprived Petitioner, a party litigant, the fundamental right to be present at the trial of his case resulting in what was little more than an ex parte hearing. *Etta v. Middleton*, 62 A. 2d 371 (M. C. D. C. 1948). Furthermore, our federal courts have recently acknowledged that the question of credibility, where essential to a decision on the merits, "is a matter of very serious consideration." *Connelly d Caudle v. U. S. A.*, 249 F. 2d 576, 580 (8th Cir. 1957).

The accompanying record is void of any claim that Petitioner's motion below was made in bad faith. Presence of his medical adviser in open court precludes any such implication. The record is equally void of any showing of loss or hardship to the other party litigants. What is shown by this record is the extent to which the testimony of Petitioner is essential to his case. The pleadings (R 18a) reflect the complexity of the factual issues involved. Not only was Petitioner's testimony material, but his knowledge of these facts made intelligent cross-examination without him impossible. Denial of a continuance under the circumstances was abuse of discretion violative of Petitioner's due process of law.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK F. TRUSCOTT,
929 Land Title Bldg.,
Phila. 10, Pa.,
Counsel for Petitioner

July 11, 1958.

APPENDIX.

THE CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

The due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Girard Trust Corn Exchange Bank *v.* Alker, Appellant.

Argued January 15, 1958. Before Jones, C. J., Bell, Chidsey, Musmanno, Jones and Cohen, *JJ.*

Appeal, No. 358, Jan. T., 1957, from judgment of Court of Common Pleas No. 1 of Philadelphia County, March T., 1954, No. 973, in case of Girard Trust Corn Exchange Bank et al., Executors v. Harry J. Alker, Jr. Judgment affirmed; reargument refused April 15, 1958.

Assumpsit. Before MacNeille, P. J., without a jury.

Adjudication entered finding for plaintiffs; defendant's exceptions to findings and petition for new trial dismissed, and judgment entered for plaintiffs. Defendant appealed.

Frank F. Truscott, with him *John J. Gilbride, Jr., Isidore Baylson, William B. Allen* and *George Chimples*, for appellant.

Edwin Booth, with him *William F. Scheufele*, for appellees.

OPINION PER CURIAM, March 17, 1958:

This appeal grows out of an action in assumpsit which resulted in the entry of a judgment in favor of the plaintiff and against the defendant in the sum of $143,876.62, which is the subject of this appeal. The case was tried to the court below without a jury. The findings of the trial judge are adequately supported by the evidence and, upon exceptions thereto by the defendant, were confirmed by the court *en banc*. They, therefore have the weight of a jury's verdict and the conclusions of law made by the court correctly flowed from the findings so established. Our examination of the record has failed to disclose the slightest merit in any of the appellant's assignments of error.

Judgment affirmed.

ORDER OF THE COURT.

April 15, 1958, petition denied.

PER CURIAM.

JOHN T. FEY, CLERK

IN THE

Supreme Court of the United States

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK and FLORENCE FISHER DUNWOODY, Executors under the Will of Mamie DuBan, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EDWIN BOOTH,
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Philadelphia 2, Pa.,
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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

In an action brought by the executors of a deceased widow against a lawyer who had represented her to the date of her decease, and who sought to defend on the ground of an alleged oral agreement with the decedent, can it be held that the defendant was deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States because the trial court proceeded to the trial after seven continuances granted to the defendant on the ground of illness or other causes, but afforded the defendant ample opportunity to testify by depositions in the privacy of his own office and his depositions were taken, transcribed and offered in evidence at the trial, but their admission was refused because the defendant was incompetent under the laws of the State to testify as to any matters alleged to have occurred between him and his deceased client in her lifetime?

STATEMENT OF THE CASE.

This case involves an action in assumpsit brought on March 10, 1954 by the respondents as Executors of the estate of Mamie DuBan, who died at Philadelphia, November 8, 1953, at the age of 86 years, to recover from the petitioner, Harry J. Alker, Jr., the value of 1,925 shares of common stock of the National Dairy Products Corporation and a sum equivalent to a dividend declared and paid thereon on December 10, 1953, with interest.

There is no dispute as to the following facts which were established either by admissions in the pleadings offered in evidence, admissions of counsel for petitioner at the trial or established by documentary proof the authenticity of which is unquestioned.

In 1930 and 1931 the petitioner, who had long been a close personal friend and legal adviser of Alfred A. DuBan, the husband of Mamie DuBan, borrowed at four different times an aggregate of 4,400 shares of stock of National Dairy Products Corporation, the stock of which was then and continues to be listed and dealt in daily on the New York Stock Exchange. At the time the loans were made petitioner gave to Mr. DuBan written evidence of his obligation to return the stock "upon demand if not sooner" and petitioner delivered to Mr. DuBan as collateral security an insurance policy for $50,000. on the life of petitioner in the Metropolitan Life Insurance Company and a certificate for 125 shares of stock of Mrs. Smith's Pie Company, with assignments thereof. The Dairy Corporation stock was, with Mr. DuBan's consent, deposited by the petitioner with the Integrity Trust Company, of Philadelphia, as further collateral for loans made by that Company to the petitioner. The stock remained in Mr. DuBan's name and all dividends declared thereon were paid directly to Mr. DuBan during his lifetime.

Alfred A. DuBan died on November 12, 1938 and his wife was Executrix and sole beneficiary under his will. The petitioner was counsel for Mrs. DuBan in the settlement of her husband's estate and continued to act as her legal adviser until her decease.

Mrs. DuBan received directly as Executrix all dividends paid on the 4,400 shares of Dairy Corporation stock until December 1942. Sometime in 1942 the shares of stock were transferred by the Federal Deposit Insurance Corporation, assignee of the Integrity Trust Company, unto itself and Mrs. DuBan thereafter received no further dividends from the Dairy Corporation. Beginning in December 1942 (R. 278a) the petitioner paid to Mrs. DuBan amounts equivalent to all dividends as they were declared and paid on the unreturned stock until the time of her death, his checks being frequently enclosed in letters (R. 278a, 285a, 286a). The petitioner returned to Mrs. DuBan at various times an

aggregate of 2,475 shares so that at the time of her death he owed to her 1,925 shares.

On April 12, 1946 Mrs. DuBan as Executrix of her husband's estate and at the suggestion of the petitioner executed a paper prepared by the petitioner, assigning unto herself individually the claim of the estate against certain persons including the "claim against Harry J. Alker, Jr. together with all interest of the estate in the Metropolitan Life Insurance policy assigned as collateral." The insurance policy, premiums on which had been paid by the petitioner and the assignment of the certificate for 125 shares of stock of Mrs. Smith's Pie Company were found in Mrs. DuBan's apartment after her death. The certificate for the Pie Company stock was found in her safe deposit box.

On December 10, 1953 the Dairy Corporation declared and paid a dividend which on the 1,925 shares unreturned amounted to $1,443.75. The petitioner did not make payment to Mrs. DuBan's estate of this amount. Nor did the petitioner return the 1,925 shares of stock although formal demand for the return thereof by March 8, 1954 and for the payment of a sum equivalent to the dividend was made by the Executors of Mrs. DuBan's estate on February 24, 1954. This suit claiming $126,067.50 the admitted value on March 8, 1954 of the unreturned stock and the dividend and interest was thereupon instituted.

The sole defense interposed by petitioner was that he had entered into an oral agreement with Mrs. DuBan that if he paid to her sums equivalent to the dividends declared and paid on the unreturned shares of Dairy Corporation stock during her lifetime and made no charge to her for services rendered to her or her deceased husband then upon her death he was to be under no further obligation to her or her estate with reference to any shares he had not returned to her.

After seven continuances upon application of the petitioner, the case was tried before Honorable Raymond J.

MacNeille, P. J., Common Pleas No. 3, without a jury and on July 10, 1956 the trial judge filed an opinion finding for the respondents in the sum of $143,876.42. Exceptions were filed by the petitioner. After some further maneuvering by the petitioner the exceptions were argued before the court en banc and dismissed. Judgment was thereupon entered for the respondents on July 9, 1957.

Upon appeal of the petitioner to the Supreme Court of Pennsylvania the judgment was affirmed in a per curiam opinion, 392 Pa. 47; 139 A. 2d 901, the appellate court finding that "the record has failed to disclose the slightest merit in any of the appellant's assignments of error."

Subsequently the petitioner filed a petition for reargument which the Supreme Court of Pennsylvania denied.

ARGUMENT.

I. THE REFUSAL OF THE TRIAL JUDGE OF PETITIONER'S APPLICATION FOR FURTHER CONTINUANCE WAS NOT AN ABUSE OF DISCRETION NOR A DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

At the outset it should be borne in mind that the action was instituted by the Executors of a decedent's estate and under the law of Pennsylvania the petitioner was incompetent to testify as to any matters or things happening prior to the death of the decedent (R. 316a, 317a).

The action was instituted on March 9, 1954. Prior to March, 1956 the case had been listed for trial seven times and the petitioner on the ground of illness or other cause had procured continuances over the objection of counsel for the respondents. On the preliminary call of the list for

March 1956, no application was made by petitioner for a continuance as required by the rules of the local court and the case was listed for trial on March 27, 1956. On March 5, 1956 the petitioner and his counsel were notified that the respondents would insist upon the trial of the case when it was called on March 27, 1956. When on March 27, 1956 the respondents, with their counsel and witnesses were present in court and ready to proceed with the case, counsel for the petitioner, without any previous notice to the respondents, made application to the trial judge for a further continuance for two months on the grounds of illness of the petitioner and in support of such application called one Dr. Ronald C. Moore. A most cursory reading of the testimony of Dr. Moore will be convincing that the trial judge committed no abuse of discretion in granting a continuance to enable the petitioner to testify by depositions in the quiet of his own office with the understanding that when the depositions were completed the court would proceed with the trial.

The petitioner's contention that he was not accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States is fully answered by the following quotation from the opinion of the court below en banc sur the petitioner's exceptions to the findings of the trial court (R. 350a).

> "The defendant contends (exceptions 1, 2 and 24) that he was not afforded due process of law because the trial judge refused his request for further continuance on March 27, 1956. The events are properly set forth in the trial judge's opinion as follows:
>
> 'When the case was called for trial on March 27, 1956, a plea for continuance was made on the ground of the defendant's ill health. Out of consideration for this circumstance and respect for the opinion expressed by a medical attendant of the defendant, the court granted a continuance and gave the defendant leave to testify in deposition form in his own office,

subject, of course, to objection by the plaintiffs on the ground of the defendant's incompetency. The defendant's deposition was so taken, transcribed and filed. The matter then came on for trial on April 25, 1956.'

It may therefore be noted that in actual effect the defendant was granted a continuance of one month. The depositions began on March 28, 1956 and were continued at the defendant's request until April 16, 1956. There was then a further continuance at the defendant's request and the depositions were concluded on April 20, 1956. This case was called for trial after the trial date had been fixed at a preliminary call of the trial list and no request for continuance was made at the time of the preliminary call: See Pa. R. C. P. 216 (c). As stated by the plaintiffs in their brief, '. . . prior to March, 1956, (this) case had been listed for trial at least seven times and the defendant on the ground of illness or other cause had procured continuances'. We may briefly note that the complaint was filed on March 9, 1954 and the action involved serious and substantial allegations with regard to a member of the bar of this court. Although an attorney does not by virtue of such office forfeit any of his rights as a litigant, we are of the opinion that his conduct should be most carefully scrutinized and he should be prevented from using his skills to procure interminable delays in the disposition of litigation against himself. In this case we are fully satisfied, without reference to personalities, that the matter was ripe for disposition; that any further delay was not in the interest of justice. The grant or refusal of a continuance is a matter within the reasonable discretion of the trial judge; Anderson v. Guerrein Sky-Way Amusement Co., 346 Pa. 80 (1943); McNernie v. W. S. Peace, Inc., 344 Pa. 24 (1942); State Board of Medical Education and Licensure v. Williams, 172 Pa. Superior Ct. 448

(1953); and we are satisfied that there was no abuse of discretion by the trial judge."

The petitioner had from March 1954 until March 1956 to prepare for the trial of the case and to furnish to his numerous counsel all of the information that was available for his defense. Prior to, at the time of the trial and immediately subsequent thereto, the petitioner was continuously going to his office each day and continuing the usual activities incident to the practice of his profession.

Truly, as the court below said (R. 354a) "defendant has deliberately and improperly delayed the disposition of this case; that he has used various devices, such as changing counsel and asserting ill health, to that end."

II. THERE IS NOT PRESENTED ANY FEDERAL QUESTION TO WARRANT THE GRANT OF CERTIORARI BY THIS COURT.

It is apparent that the petitioner was afforded a full and fair trial in accordance with the settled judicial procedure of the Commonwealth of Pennsylvania and it has been so determined by the trial judge, the court below en banc, and the Supreme Court of Pennsylvania. It is well settled that this court will not grant review of such a case.

The Fourteenth Amendment to the Constitution of the United States in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations may be enforced, provided the method of procedure adopted for the purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467.

Furthermore the Pennsylvania rule that the grant or refusal of a continuance is a matter within the reasonable discretion of the trial judge is uniformly followed in all juris-

dictions and is in accord with that laid down by this Court in numerous cases involving the refusal of a continuance by federal trial courts.

> "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Hardy v. United States*, 186 U. S. 224, 22 S. Ct. 889, 46 L. Ed. 1137. Citing *Isaacs v. United States*, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229, and authorities there cited. See also *Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343 and *Fidelity & Deposit Co. v. L. Bucki & Son*, 189 U. S. 135, 23 S. Ct. 582, 47 L. Ed. 744.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN BOOTH,
Counsel for Respondents.
1600 Girard Trust Bldg.,
Phila. 2, Pa.

Office-Supreme Court, U.S.
FILED
SEP 22 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

v.

GIRARD TRUST CORN EXCHANGE BANK and FLORENCE FISHER DUNWOODY, Executors under the Will of MAMIE DuBAN, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

Petitioner's Reply Memorandum.

FRANK F. TRESCOTT,
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IN THE

Supreme Court of the United States.

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,
Petitioner,

GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, EXECUTORS UNDER THE WILL OF MAMIE DEBAN, DECEASED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

PETITIONER'S REPLY MEMORANDUM.

The Brief in Opposition, because of many statements made without propriety in law or fact, compels your petitioner to reply as follows:

The sole issue before this Honorable Court is whether due process of law under the Fourteenth Amendment to the Constitution of the United States, was afforded this petitioner by the Court of Common Pleas of Philadelphia County, Pennsylvania.

Prior continuances are irrelevant to the question of whether the Trial Court abused its discretion in denying

petitioner's motion for a new trial. Whatever the grounds for previous continuances, the defendant has the right to be present at the trial of his case and is not responsible for the misfortune overtaking him. *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620. Petitioner, through his personal physician, offered uncontradicted testimony in open Court indicating physical incapacity to be available for trial. The subsequent trial held without petitioner's presence denied him a hearing appropriate to the case. *Mullane v. Central R. & T. Co.*, 339 U. S. 306, 94 L. Ed. 865 (1950). What took place was little more than an ex parte hearing. *Ellis v. Middleton*, 62 A. 2d 371 (M. C. D. C. 1948).

It must be noted that respondents are attempting to mislead this Honorable Court in the Brief in Opposition:

(a) as to the number of continuances, see (Br. op. p. 4), which is different from those claimed prior hereto (R. 340a);

(b) in that an application was made without notice (Br. op. p. 6) when in fact notice was given and because respondents objected, medical testimony (R. 49a) was introduced in lieu of the usual physician's certificate as required by rules of the Court;

(c) in that depositions were continued twice (Br. op. p. 7), when in fact they were taken on the date fixed (R. 168a);

(d) in that skills were used to produce delays (Br. op. p. 8) when the matter came to trial within two years from its inception, clearly a normal course of events;

(e) in that petitioner carried on normal business activities (Br. op. p. 8) without a scintilla of evidence to support this serious charge in the record, (unfounded opinions of a trial judge are not evidence);

(f) and the shrewd device of changing counsel (Br. op. p. 8) consisted of the withdrawal of Edwin Hall, II, Esquire,—when he moved his office to another county in August, 1954.

It is important to every person that no mock trial, or any trial short of a full and fair trial with the opportunity to be present with counsel, and to hear and confront witnesses, take place in these United States.

Respectfully submitted,

FRANK F. TRESCOTT,
929 Land Title Bldg.,
Philadelphia, Pa.,
Attorney for Petitioner.

September, 1958

NOV 7 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, EXECUTORS UNDER THE WILL OF MAMIE DU BAN, Deceased.

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

FRANK F. TRESCOTT,
[illegible] Land Title Building,
Philadelphia 10, Pa.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No. 176

HARRY J. ALKER, JR.,

Petitioner,

GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, EXECUTORS UNDER THE WILL OF MAMIE DEBAN, DECEASED.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant a rehearing of its order of October 13, 1958, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above entitled case as prayed for in the petition filed July 15, 1958, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. An important question on the fundamental right to a hearing appropriate to the nature of the case under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution is involved here.

2. The Courts of the Commonwealth of Pennsylvania have deprived your petitioner of property by entering and sustaining a judgment in excess of $150,000.00 against him, without affording him the opportunity to appear in court not only to be heard, but to properly prepare his defense.

3. The trial court in proceeding to trial without the defendant in the face of uncontradicted medical testimony of physical incapacity conducted little more than an ex parte hearing. *Etta v. Middleton*, 62 A. 2d 371 (M. C. D. C. 1948). The refusal of a continuance when uncontradicted medical testimony was presented constituted reversible error, especially where there was no showing that the continuance would have resulted in serious loss to other parties, *Harrah et al. v. Morgenthau*, 89 F. 2d 863 (1937); *Carmack v. Commonwealth*, 118 F. 2d 396 (1941).

4. On appeal to the Supreme Court of Pennsylvania that court by handing down a per curiam opinion not only ignored this important question, but also a question of first impression in that jurisdiction involving the waiver of incompetency as to the admissibility of evidence which would probably have changed the results of the case had it been admitted.

5. A suit is pending, and was prior to the death of Respondents' decedent, in the United States District Court for the Eastern District of Pennsylvania between the Federal Deposit Insurance Corporation, as plaintiff, to the use of Butcher & Sherrerd and Fidelity Philadelphia Trust Company; and the DuBan Estate and the petitioner, here as defendants, in which proceeding it is contended by the DuBan Estate and petitioner that the stock involved in this proceeding, among other assets, had been illegally converted by the Federal Deposit Insurance Corporation, and they demanded its return to the DuBan Estate and petitioner. The Respondents were fully acquainted that this action was and is pending, and that the Respondents' decedent had up to the time of her death participated in the said proceeding and signed all pleadings therein. This is certainly confirmatory of the alleged agreement with the petitioner, the existence of which had been testified to by Respondents' decedent's sister in law and contended by petitioner.

6. That the Respondents' position in attempting to prosecute before this Court and the Court below their alleged claim against petitioner is untenable by reason of the fact that the Respondents appeared before the Estate Tax Division of the Internal Revenue Service in the Estate of Mamie DuBan, Respondents' decedent, and represented to the said Service that the alleged claim had no value (even though Respondents had in their possession certain valuable property belonging to petitioner which they alleged they held as collateral for their alleged claim) and the Internal Revenue Service by reason of the said allegations by Respondents, and after investigation, found the value of the alleged claim was zero (R 336-7). In view of the fact that the Respondents had the above assets which they claimed to be collateral, the Internal Revenue Service could only have so found if it came to the conclusion that the alleged claim was without foundation or merit.

Conclusion.

The sole purpose of our judicial process is to dispense justice. Without a full and fair hearing, the courts must fail of this purpose. For the above reasons, therefore, and the reasons set forth in the petition for certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Supreme Court of the Commonwealth of Pennsylvania.

FRANK F. TRUSCOTT,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

FRANK F. TRUSCOTT,
Counsel for Petitioner.